# EDITOR'S NOTE

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10. 8					Title: James Ernest Hitchcock, Petitioner
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APIT	AL C	ASE			Louis L. Wainwright, Secretary, Florida Department
					of Corrections
					Court: United States Court of Appeals
					for the Eleventh Circuit
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ipril	18,	198	56		Counsel for petitioner: Barnard, Craig S.
					Counsel for respondent: Prospect, Richard W., Daly, Sean
intry	1	Date		Not	e Proceedings and Orders
1	Feb	6	1986		Application for extension of time to file petition and
					order granting same until April 18, 1986 (Powell,
-					rebruary 6, 1986).
2	ADP	18	1986	G	Petition for writ of certiorari and motion for leave to
					proceed in forma pauperis filed.
4	May		1980		Supplemental brief of petitioner James E. Hitchcock files.
5	May	16	1955		Brief of respondent Wainwright, Sec., FL DOC in opposition tiled.
6	-	21	1986		DISTRIBUTED. June 5, 1986
10			1986		
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					presented by the petition.
13		7	1986		
	301	•	1700		wreer extending time to file brief of petitioner on the merits until August by 1986.
14	Jul	17	1986		Joint appendix filed.
15			1986		SET FOR ARGUMENT. Wednesday, October 15, 1986. (2nd
					case) (1 hour).
16	Aug	14	1986		Record filed.
17			1956		***************************************
18			1986		certified original record, 6 volumes, received.
	aug	- 1	1700		application of petitioner for leave to file a brief on
					the merits in excess of the page limitation filec (A-
19	A	11	1986		
.,	409	21	1 706		and order granting same by Powell, J., on Aug. 23, 195
20					The brief may not exceed 57 pages.
20			1986		Brief of petitioner James E. Hitchcock filed.
21			1986		LIRCULATED.
22	260	0	1986	X	Brief amicus curiae of California filed.
	26b	10	1966	X	Brier of respondent Wainwright, Sec., FL DOC filed.
23	_	_			
24 25	Oct	2	1986	X	Reply brief of petitioner James E. Hitchcock filed.

No. 85-6756

APRIL 18, 1986

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

w.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD Chief Assistant Public Defender

RICHARD H. BURR III Assistant Public Defender

Counsel for Petitioner

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OFFICE OF THE CLERK SUPREME COURT, U.S.

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#### QUESTIONS PRESENTED

- I. Whether the Eighth Amendment as construed in Lockett v.

  Ohio forbids the execution of a death sentence obtained at a pre-Lockett Florida trial in which defense counsel failed to prepare, present and argue available nonstatutory mitigating evidence because a controlling decision of the State's highest court had explicitly held that only statutorily enumerated mitigating factors could be considered in the capital sentencing process?
  - II. Whether the Court of Appeals below erred in holding:
- A. that in order to prevail on this sort of <u>Lockett</u> claim, a federal habeas petitioner is required to demonstrate that his attorney would have presented a <u>different kind</u> of evidence in mitigation, rather than simply that the attorney would have made a fuller, more focused, and more forceful presentation of mitigation, if the unconstitutional rule of state law had not been in effect;
- B. that in deciding whether the attorney would have presented additional evidence and argument in mitigation, a plausible and well-pleaded allegation that significant mitigating evidence and argument were not presented because of the State's unconstitutional rule of law may be rejected without an evidentiary hearing in any court, consistently with the federal habeas procedures prescribed by Blackledge v. Allison; and
- C. that a novel procedural rule denying a habeas petitioner an evidentiary hearing on this issue where his supporting affidavit from his trial attorney fails explicitly to state that the attorney would have presented additional evidence and argument in mitigation may properly be applied to an affidavit drafted before the announcement of the rule, without permitting the petitioner an opportunity to present supplemental affidavits?

- III. Whether the imposition of a death sentence by the court after it had offered the defendant a life sentence prior to trial, without an affirmative record showing to justify the "qualitatively" enhanced penalty imposed after the defendant had exercised his fundamental right to trial by jury, violates the Due Process Clause and Eighth Amendment guarantees of fairness and reliability?
- IV. Whether Mr. Hitchcock should be provided the opportunity to prove at an evidentiary hearing his claim that the death penalty is being arbitrarily applied in Florida on the basis of race and other impermissible factors in violation of the Eighth and Fourteenth Amendments especially in view of the new standards for evaluating such claims announced by the Court of Appeals?

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No.

#### IN THE

# SUPREME COURT OF THE UNITED STATES OCTOBER TERM 1985

JAMES ERNEST HITCHCOCK,

Betitioner,

VS.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, JAMES ERNEST HITCHCOCK, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit filed August 28, 1985, and states:

#### CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 770 F.2d 1514 (11th Cir. 1985) (en banc), and is set out at pages la-13a of the Appendix. The opinion denying rehearing is reported at 777 F.2d 628 (11th Cir. 1985) and is set out at App. 14a-16a. The panel opinion of the court of appeals is reported at 745 F.2d 1332 (11th Cir. 1985) and is set out at App. 17a-33a. The Order of the United States District Court, Middle District of Florida, dismissing the petition for writ of habeas corpus, and the Memorandum of Decision of that court are unreported, and are set out in the Appendix at pages 38a-39a and 40a-66a respectively.

#### JURISDICTION

The judgment and opinion of the Court of Appeals were filed on August 28, 1985, and petitioner's timely petition for rehearing was denied on November 19, 1985. Thereafter, Justice Powell entered an order extending the time within which to file the petition for writ of certiorari to and including April 18, 1986. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

In all criminal prosecutions, the accred shall enjoy the right to ... have the assistance of counsel for his defence:

the Eighth Amendment which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted:

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

[N] or shall by State deprive any person of life, liberty, or property, without due process of law....

It also involves Section 921.141, <u>Plorida Statutes</u> (1975) which is set out in the Appendix hereto at App. 34a. Also included in the Appendix is the amended statute, Section 921.141, <u>Florida Statutes</u> (1979), App. 36a.

### STATEMENT OF THE CASE

#### A. Course of Prior Proceedings

Mr. Hitchcock was convicted of first degree murder, after trial by jury in January, 1977, in Orange County, Florida. A capital penalty trial was held in February and the jury returned a sentencing verdict of death. The judge sentenced Mr. Hitchcock to death a week later. Mr. Hitchcock's conviction and sentence were affirmed on direct appeal. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960 (1982).

Citations to the Appendix accompanying this petition are designated App. \_\_\_\_.

Thereafter, Mr. Hitchcock filed a motion for post-conviction relief in the state trial court pursuant to <a href="Fla.R.Crim.P">Fla.R.Crim.P</a>. 3.850. He also filed pleadings requesting a stay of execution, and expenses for expert and lay witnesses. The trial court denied Mr. Hitchcock's motion for post-conviction relief without an evidentiary hearing and a week later the Florida Supreme Court affirmed that denial. <a href="Hitchcock v. State">Hitchcock v. State</a>, 432 So.2d 42 (Fla. 1983).

In the United States District Court for the Middle District of Florida, Mr. Hitchcock had filed his petition for writ of habeas corpus, 2 together with an application for stay of execution and a motion for continuance pending the exhaustion of the state court proceedings. After the ruling by the Florida Supreme Court, the federal district court entered a stay of execution. Thereafter, the respondent filed a motion to dismiss pursuant to Rose v. Lundy, 455 U.S. 509 (1982) (pertaining to exhaustion of state remedies), and Mr. Hitchcock filed motions for leave to amend the habeas petition, for expenses of witnesses, for discovery, and for an evidentiary hearing. The motion for leave to amend the habeas petition was granted.

A motion hearing was then held on the remaining motions -respondent's motion to dismiss, and Mr. Hitchcock's motions for
expenses, discovery, and for an evidentiary hearing. The district
court reserved ruling on all of the motions, except the motion
for evidentiary hearing, which it indicated would be granted.
However, on September 22, 1983, the district court entered an
order summarily dismissing Mr. Hitchcock's petition for writ of
habeas corpus pursuant to Rule 4, Rules Governing Section 2254
Cases in the United States District Courts.

Mr. Hitchcock filed his notice of appeal and the district court issued a certificate of probable cause to appeal. A panel of the Eleventh Circuit Court of Appeals affirmed, by a two to one decision, the district court's summary dismissal of the habeas petition. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984); App. 17a. Mr. Hitchcock's timely-filed suggestion for rehearing en banc was granted. 745 F.2d at 1348; App. 33a. The en banc court, by a seven to five margin, reinstated the panel's judgment. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985); App. 1a. A timely petition for rehearing was denied with an opinion filed November 19, 1985. Hitchcock v. Wainwright, 777 F.2d 628 (11th Cir. 1985); App. 14a.

#### B. Statement of the Pacts

The panel opinion of the court of appeals briefly summarized the facts concerning the offense:

Thirteen-year-old Cynthia Driggers was murdered by strangulation on July 31, 1976. Her body was recovered later that same day. An autopsy revealed that Drigger's hymen had been recently lacerated and that sperm was present in her vagina. Her face had cuts and bruises in the vicinity of the eyes. On August 4, 1976, petitioner confessed to the murder. He claimed that he and the victim had consensual sexual relations and he killed her when she became upset afterward and threatened to tell her parents. At trial, petitioner changed his story. He testified his brother, Richard, the girl's stepfather, discovered Cynthia and him having intercourse and reacted by strangling the girl.

745 F.2d at 1334: App. 19a. The offense occurred in Richard's house where James Hitchcock was also living. In support of his defense, James attempted to present evidence concerning Richard's character for violence and his relationship with James in order to demonstrate that it was likely that Richard committed the offense and that James would have been motivated to accept the blame and to cover up for Richard.

At the sentencing trial the prosecution presented no additional testimony and the defense presented only one witness, James Harold Hitchcock, another brother of petitioner, who testified that petitioner had a habit of "sucking on gas" from

Jurisdiction of the federal court was invoked pursuant to 28 U.S.C. § 2241 and § 2254, the petitioner being held in the custody of the State of Florida, and petitioner alleging that such custody was in violation of the Constitution of the United States.

automobiles when he was five or six years old, which caused him to "pass out" once and that after that his "mind wandered." TAS 7-8.<sup>3</sup> He further testified that petitioner had come from a family with seven children, which earned its livelihood by picking cotton. TAS 8-9. Thereafter, the jury recommended and the judge imposed a death sentence. In support of the sentence, the judge entered findings of fact in which he found three aggravating circumstances<sup>4</sup> and one mitigating circumstance.<sup>5</sup>

#### REASONS FOR GRANTING THE WRIT

I.

THE EIGHTH AMENDMENT AS CONSTRUED IN LOCKETT V.
OHIO PORBIDS THE EXECUTION OF A DEATH SENTENCE
OBTAINED AT A PRE-LOCKETT PLORIDA TRIAL IN
WHICH DEPENSE COUNSEL FAILED TO PREPARE,
PRESENT AND ARGUE AVAILABLE NONSTATUTORY
MITIGATING EVIDENCE BECAUSE THE CONTROLLING
PRECEDENT OF THE STATE'S HIGHEST COURT HAD
EXPLICITLY HELD THAT ONLY STATUTORILY ENUMERATED MITIGATING PACTORS COULD BE CONSIDERED IN
THE CAPITAL SENTENCING PROCESS

The issue at bar is of singular importance to the application of the Plorida capital sentencing statute in the years prior to Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Hitchcock's trial counsel -- reasonably, by all accounts -- relied upon the authoritative construction of the state's highest court that mitigating evidence was strictly limited to statutory factors and as a result forewent substantial investigation, presentation, and argument of significant nonstatutory mitigating evidence. As a consequence, the sentencing jury and judge were unable to consider significant nonstatutory mitigating evidence and were directed by counsel's advocacy to consider only statutory mitigating circumstances as a basis for a sentence less than death. The question is whether such a result violated the Eighth Amendment.

Although the <u>en banc</u> majority did not directly decide this issue, it did assume or acknowledge the general validity of the claim, and the issue has been squarely presented by the record and the contentions of the parties throughout the litigation. It merits <u>certiorari</u> for several reasons. <u>First</u>, it is a question common to a considerable number of Florida death cases of the same vintage as Mr. Hitchcock's case, and has been much litigated before both the Florida Supreme Court and the federal habeas corpus courts but not consistently or satisfactorily resolved by either. The Florida Supreme Court, for example, has ruled on a case-by-case basis either that <u>Lockett</u> was or was not a change in Florida law depending upon the particular circumstances of the case then before it, but in every case it has

The following symbols will be used to refer to the record in the court below. "R" refers to the record on appeal filed in the court of appeals. The portions of the record of the state court proceedings contained as exhibits in the Record are referred to by the following designations: "T" denotes the transcript of the trial in state court; "TR" designates the record on direct appeal in the Florida Supreme Court: "TAS" refers to the transcript of the advisory sentencing proceedings; and "TS" denotes the transcript of the imposition of the sentence by the state judge.

<sup>&</sup>quot;The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery.... [T]he defendant killed Cynthia Ann Driggers for one purpose only, to avoid being arrested after commission of the involuntary sexual battery.... The murder was especially heinous, wicked, or cruel." TR 196-197.

<sup>5 &</sup>quot;At the time of the murder, defendant was 20 years of age. [This] [c]ircumstance ... is applicable." TR 197.

denied relief. 6 Thus, the very failure of the en banc court of appeals below to settle this recurring issue perpetuates confusion about it that can now be laid to rest only by this Court. 7 Second, the substantive issue is a vital one, involving the imposition of death sentences under a rule of law that this Court has condemned as violating the most basic constitutional principle of capital sentencing. Third, as shown in Part II, infra, the grounds of decision below are interwoven with the basic constitutional question and are insufficient to avoid it.

It is no longer seriously disputed that Florida law prior to the 1978 decision in <u>Lockett v. Ohio</u> could reasonably be applied to restrict the consideration of mitigating factors to the statutory list.

In <u>Cooper v. State</u>, 336 So.2d 1133 (Fla. 1976) the Florida Supreme Court affirmed the preclusion of mitigating evidence (stable employment record) proffered by the defendant, on the ground that it was not included in the statutory list: "the Legislature chose to list the mitigating circumstances which it judged to be reliable ... and we are not free to expand that list." <u>Id</u>. at 1139. The court emphasized that the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute were "words of mandatory limitation." <u>Id</u>. at 1139 n.7. It explained that such a result was required by <u>Furman v. Georgia</u>, 408 U.S. 238 (1972): "This [mandatory limitation on mitigating factors] may appear to be narrowly harsh, but under <u>Furman undisciplined</u> discretion is

abhorrent whether operating for or against the death penalty."

Id. (emphasis in original). Moreover, the decision in Cooper was the authoritative pronouncement on state law as to this subject, for it was announced a few days after the Court's decision in Proffitt upholding the facial constitutionality of the Florida capital sentencing statute.8

This limiting application by Florida's highest court has been recognized by courts that have reviewed the status of the Florida law during the period before Lockett. The Eleventh

- 8 -

Compare Muhammad v. State, 426 So.2d 533 (Fla. 1983) (trial counsel could not be expected to predict the decision in Lockett with regard to the scope of permissible mitigating factors); Jackson v. State, 436 So.2d 4 (Fla. 1983) (same), with, Cooper v. State, 437 So.2d 1070, 1072 (Fla. 1983) ("Lockett did not change the law of Florida").

See also the following cases pending before the Court in which some aspect of the restrictive application of Florida law before Lockett is raised: Sireci v. Florida, No. 84-6895, pet. for cert. filed June 12, 1985; Wainwright v. Songer, No. 85-567, pet. for cert. filed September 30, 1985; Darden v. Wainwright, No. 65-5319, cert. granted, September 3, 1985.

The plurality opinion in Proffitt v. Florida, 428 U.S. 242 (1976) has occasionally been cited as proof that Florida did not preclude consideration of nonstatutory mitigating factors. Such a reading of Proffitt is unwarranted. First, Cooper was announced after Proffitt so if Proffitt had actually so held, then Cooper would not have been decided to the contrary. Even so, the Proffitt opinion itself inserted in brackets the modifying word "statutory" in describing the Florida process for weighing mitigating circumstances. Id. at 250. The footnote to this passage of the plurality opinion is what some have tried to read as holding that the statute was open-ended since it noted that the word "limited" was included in the statute with regard to aggravating factors and not included regarding mitigating factors. Id. at 250 n.8. However, in this footnote the Court was actually focusing on the limitation on aggravating factors by contrasting it with the provision for mitigation. At best, the observations are conflicting, probably because the Court was only concerned with the facial validity of the statute. See id. at 254 n.11; Gregg v. Georgia, 428 U.S 153, 201 n.51 (1976). Also, it is at least of historical interest that this difference in language was the result of an undetected transcription error, not legislative intent. See Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 358 n.199 (1981).

Circuit below<sup>9</sup> and in other cases<sup>10</sup> has recognized the limiting application of the statute authoritatively mandated by Cooper. The Court also has noted the change in Florida law with regard to removing restrictions on mitigating factors in 1978 after Lockett.<sup>11</sup> The Florida Supreme Court on occasion has also noted the susceptibility of its statute to an unconstitutional

application before Lockett. 12 While the Florida court's pre-Lockett application of its statute may be understandable, see Lockett. 438 U.S. at 602, that restrictive application by the state's highest court nevertheless carried with it the potential of significant constitutional narm for capital cases tried during that time.

Mr. Hitchcock's trial occurred after <u>Cooper</u> but before <u>Lockett</u>. He was tried therefore during the period in Florida law when the Florida capital sentencing statute was most authoritatively and clearly being applied in a manner that "harsh[ly]" enforced its "mandatory limitation" on the consideration of mitigating factors. The record in this case demonstrates that limitation. An affidavit by trial counsel was proffered in the district court (appended to a motion for evidentiary hearing) in which counsel states unequivocally that he was operating at Mr. Hitchcock's trial under the belief that mitigation was limited by the statute to the enumerated mitigating factors. <sup>13</sup> The record further reveals that not only Mr. Hitchcock's lawyer believed that consideration of mitigation was strictly limited to the statute, but so did the prosecutor and the judge. In arguing the weighing process of the Florida capital sentencing scheme,

The en banc majority acknowledged that "there was some ambiguity [in the Florida capital statute] as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors enumerated by the statute."

770 F.2d at 1516; App. 3a. The "confusion in Florida law surrounding nonstatutory mitigating evidence" was "finally alleviated" after Lockett. Id. However, in view of the clarity of the Cooper opinion in enforcing a "mandatory limitation" on mitigating evidence, it could be questioned whether Florida law could be characterized as containing merely "some ambiguity" or "confusion."

See, e.g., Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (state trial judge had interpreted the Florida statute as limiting the consideration of mitigating factors to the statutory circumstances); id. at 1495 (Clark, J., concurring and dissenting) ("Florida law, as reasonably and logically construed by both [counsel and the trial court], operated to preclude non-statutory mitigating evidence"); Proffitt v. Wainwright, 685 F.2d 1227, 1238 n.19 (11th Cir. 1982) (finding that Cooper held that mitigating factors were limited exclusively to the statute); Ford v. Strickland, 696 F.2d 804, 812 (11th Cir. 1983) (en banc) (Lockett was a "direct reversal" of the Cooper holding that mitigating factors were limited to the statute); Foster v. Strickland, 707 F.2d 1339, 1346 (11th Cir. 1983) (in Cooper "the Florida Supreme Court ruled explicitly that the jury could consider only statutory mitigating circumstances").

See Spaziano v. Florida, U.S. , 104 S.Ct. 3154, 3158 n.4 (1984) (recognizing the change in Florida law that occurred in 1978 from consideration of only "statutory mitigating circumstances" to "any mitigating circumstances"); Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (same). See also Songer v. Wainwright, U.S. , 105 S.Ct. 817 (1985) (order denying certiorari, Marshall, J., dissenting) (surveying the history of Florida law regarding the limitation on mitigating circumstances). As the Court noted, Florida amended its statute after Lockett to remove the "as enumerated" language from the subsections setting out the procedure to be followed by the jury and the judge for determining the appropriate sentence. See \$\$ 921.141(2),(3), Fla. Stat. (1979); App. 36a.

<sup>12</sup> In Harvard v. State, So.2d , 11 F.L.W. 55 (Fla. 1986) the court found that "our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." Id. at 56. The court also said that counsel could not be ineffective for failing to present nonstatutory mitigating evidence, "given the state of the law at the time" of Harvard's trial. Id. See also Munammad v. State, 426 So.2d 533, 538 (Fla. 1983); Perry v. State, 395 So.2d 170, 174 (Fla. 1981) (trial judge, citing Cooper, believed that the Florida statute precluded consideration of nonstatutory mitigating factors); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981) (same). On direct appeal in this case the court said "it appears that the defense itself chose to limit that presentation lof mitigating factors)."

413 So.2d at 748. However, in post-conviction relief where the reason for that defense limitation was shown, it said that the "claim boils down to merely another Lockett challenge, 432 So.2d at 43 n.2.

<sup>13</sup> The court of appeals' majority criticized counsel's affidavit for not also explicitly stating that he would have presented a different kind of defense. But, as will be shown in Part 11 infra, such criticism was both premature and legally inapposite to the Lockett claim as presented by this case.

counsel referred only to the "several different aggravating circumstances and several different mitigating circumstances that the judge is going to tell you that you are to consider in rendering an advisory verdict." TAS 17 (emphasis supplied). And, of course, the judge instructed only on the statutory mitigating factors: "The mitigating circumstances which you may consider shall be the following: [statutory list]." TAS 56.

The prosecutor's argument likewise is revealing of his belief in the limitation on mitigating circumstances. He told the jury that the judge would instruct it on the "seven mitigat" ing circumstances" and that "after you have considered all the aggravating circumstances, then you are to consider the mitigating circumstances and consider them by number. TAS 27-28 (emphasis supplied). See also TAS 43-44 (prosecutor telling the jury to use "mathematics" to sum up the statutory aggravating and mitigating factors to determine the appropriate sentence). The judge's sentencing order likewise restricted the capital sentence ing determination to consideration of only statutory mitigating factors: "this Court finds that sufficient aggravating circumstances exist as enumerated in Fla. Stat. 921,141(5) to require imposition of the death penalty, and there are insufficient mitigating circumstances, as enumerated in Fla. Stat. 921.141(d). to outweigh the aggravating circumstances. TR 192 (emphasis supplied). 14 It is quite evident from the record that all parties believed that the statute limited mitigation strictly to the statute -- a belief consistent with the "mandatory limitar tion" authoritatively set forth by the State's highest court in Cooper.

Though counsel had been able to present some brief character evidence in the quilt/innocence trial to snow that James Hitchcock's brother, Richard, was more likely to have committed the offense and why James would have tried to cover up and accept the blame for him, his presentation in the penalty trial was limited to an attempt to establish a statutory mitigating circumstance. Counsel presented another brotner's testimony that their father died when James was young and that James had "sucked on gas" and passed out once when he was five or six years old which "affected" his mind. From this evidence, counsel attempted to show the basis for the statutory mitigating circumstance relating to mental condition. § 921.141(6)(b), Fla. Stat. (1975). Counsel refrained from arguing to the jury even the barepones character evidence that had made it into the record, as being independent mitigating reasons calling for a sentence less than death. Rather, counsel simply alluded briefly to some of the evidence, offering it "for whatever purposes you [the jury] deem appropriate." TAS 14. Counsel, after this brief, restrained and enigmatic comment, then stuck strictly to the meager statutory mitigating factors in arguing against the imposition of death. TAS 21-25.15

nonstatutory mitigating evidence that was available and could have been presented had counsel not been operating under the application of the statute that limited mitigation to the statute. This evidence was proffered in Mr. Hitchcock's habeas corpus petition and as briefly shown in Part II, infra, included the substance of Mr. Hitchcock's family and social history and expert psychological analysis. That the restrictive application of the statute could have made a difference == that this was at

Harvard v. State, supra, where the original sentencing judges heard the state post-conviction motions and during those proceedings stated that they had also believed the statute limited consideration of mitigating factors, the original sentencing judge in Mr. Hitchcock's case did not hear his post-conviction motion. Thus, unlike Songer and Harvard, Mr. Hitchcock was denied the opportunity for a finding only the original judge could make: that the judge also limited his consideration to the statutory mitigating factors. Nowhere does the record show, however, that the judge applied anything but the "mandatory limitation" set down by Cooper.

The en banc majority quoted another part of counsel's closing argument -- telling the jury to consider the "whole ball of wax" -- but as shown in footnote 22, infra at pg. 22, that argument did not refer to nonstatutory mitigating evidence as the court below implies by its quotation.

best a close case for the death sentence -- is also illustrated from the record by the life sentence offered to Mr. Hitchcock by the court and prosecutor prior to trial. See Part III, infra.

Thus, the record reveals that the narrowly restrictive application of the statute actually infected this particular capital sentencing trial in a manner that denied the Bighth Amendment requirement of individualized consideration, so as to "create() the risk that the death penalty (was) imposed in spite of factors which call for a less severe penalty." Lockett, 43d U.S. at 606. As a result, Mr. Hitchcock was sentenced with the same disregard for individuating circumstances as were Monty Lee Eddings16 and Sandra Lockett. The Eighth Amendment was violated by that result. 17

This case is especially appropriate for review by the Court of this substantial constitutional question, since it is before the Court solely as a matter of law, not of fact. No evidentiary hearing has been held in either the state or federal courts. The record of this case nevertheless presents the legal claim upon a substantial factual basis, for it demonstrates the limitation on mitigating factors as directly engendered by the

pre-Lockett Florida law. Further, the issue has been litigated and decided on the merits throughout the lower courts. The issue is thus ripe for review and fully presented by this case.

only the Court can clarify the confusion that presently exists in the law. Such an urgent (and notorious) constitutional question should finally be settled to permit this and other affected cases to be uniformly resolved, lest it continue that "one person (goes) to the gallows when nonstatutory mitigating circumstances were not considered, while others may not be going because those circumstances were considered." Jackson v. State, 438 So.2d at 7 (McDonald, J., dissenting). Only the Court can prevent this tragic course.

H.

IN DENYING RELIEF ON PETITIONER'S LOCKETT CLAIM, THE COURT OF APPEALS MISCONSTRUED THE RULE OF LOCKETT AND ERRED IN HOLDING THAT PETITIONER'S CLAIM, AS PLED, DID NOT REQUIRE AN EVIDENTIARY HEARING

Lockett claim for an evidentiary hearing reflects a fundamental misunderstanding of the rule of Lockett and the necessity of an evidentiary hearing to resolve the kind of claim asserted by Mr. Hitchcock. As we set out in greater detail below, the court of appeals held that a Lockett error could occur under the circumstances presented by Mr. Hitchcock only if counsel would have presented a different kind of evidence had he not been constrained by the death penalty statute. Lockett, however, is not so limited, for it is as much concerned with the sentencer's inability to consider the facts of record as independent mitigating factors as with the sentencer's being entirely precluded from considering certain kinds of facts as mitigating factors.

Due to its misapprehension of <u>Lockett</u>, the court of appeals held that the record in Mr. Hitchcock's case demonstrated that Mr Hitchcock was not entitled to relief and thus affirmed the

<sup>16</sup> Eddings v. Oklanoma, 455 U.S. 104 (1982).

The Sixth Amendment right to the effective assistance of counsel is also implicated by this application of the statute either because the statute by reasonably restricting counsel's ability to properly represent his client by presenting individualized mitigating evidence would be "state interference with counsel's assistance," Strickland v. Washington, U.S. 104 S.Ct. 2052, 2067 (1984); cf. Herring v. New York, 422 U.S. 853, 857 (1975), or because Counsel was unreasonable in relying upon the limiting application of the statute and thus failed "to make the adversarial testing process work in [this] case. "Strickland, 104 S.Ct. at 2066. Both the Eleventh Circuit and the Florida Supreme Court have ruled, however, that Florida defense lawyers were not ineffective in failing to present nonstatutory mitigating evidence because Florida law at the time restricted the consideration of mitigating factors. See, e.g., Harvard v. State, So.2d , 11 F.L.W. 55, 56 (1986) (counsel was not ineffective "given the state of the law at the time" which limited mitigation to the statute); Muhammad v. State, 426 So.2d 533 (Fla. 1983) (trial counsel could not be "expected to predict the decision in Lockett"); Proffitt v. Wainwright, 685 F.2d 1227, 1238 (11th Cir. 1982) (same). Thus, if counsel reasonably provided representation that failed to meet the Eighth Amendment requirements of individualized consideration due to the application of the statute, then the statute itself was flawed in its application.

summary dismissal of the Lockett claim under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. Had Rule 4 been applied to Mr. Hitchcock's claim as raised, however as rather than as misconstrued by the court of appeals improperly narrow construction of Lockett == Sule 4 would not have permitted summary dismissal. Further, even if a Rule 4 dismissal might have been appropriate in light of Mr. Hitchcock's pleading and the proffered affidavit of trial counsel, Mr. Hitchcock's pleading and proffer were inadequate only in light of the court of appeals' newly-articulated standards == first announced in Mr. Hitchcock's case == for the pleading of his bockett claim. Under the well-established principles of Blackledge v. Allison, 431 U.S. 63 (1977), therefore, at the very least Mr. Hitchcock should have been provided the opportunity to satisfy those newly-announced pleading requirements.

# A. The Court of Appeals Erroneously Marrowed the Rule of Lockett in Holding that Mr. Bitchcock Had Failed to Demonstrate a Lockett Violation

In denying relief on Mr. Hitchcock's Lockett claim, the court of appeals held that

the record belies the argument that at the time of the case, the presentation to the jury (by defense counsel) would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

770 F.2d at 1517; App. 4a. Discussing counsel's "presentation to the jury," the court of appeals quite clearly understood that Lockett would have been violated under the circumstances presented by Nr. Hitchcock only if Hitchcock could show that counsel would have presented a different kind of evidence had he not been constrained by the death penalty statute. See 770 F.2d at 1517-18; App. 4a-5a (comparing the kind of evidence actually

presented with the kind of evidence that could have been presented and counsel not been constrained, and concluding that the kind of evidence that could have been presented "was developed ... to some extent for the jury"). This construction of <u>bockett</u> reflects a fundamental misunderstanding of <u>bockett</u> by the court of appeals' majority, for the holding of <u>bockett</u> was not nearly this narrow.

In <u>bockett</u> the presentence report had presented a number of nonstatutory mitigating factors to the sentencer: Sandra Lockett had a favorable prognosis for rehabilitation if returned to society, had committed no major prior offenses, was relatively young (21 years old), had no specific intent to cause the death of the victim of the crime, and played a relatively minor role in the crime. 438 U.S. at 597 597. While all of these factors could be considered by the sentencer, id. at 607-08, they "would generally not be permitted, as such, to affect the sentencing decision," id, at 608 (emphasis supplied), unless they "shed!) some light on one of the three statutory mitigating factors." Id.18 It was this aspect of the Ohio statute = that precluded the sentencer from considering the nonstatutory mitigating factors in Sandra Lockett's case as "independently mitigating factors[s]" == that violated the Eighth Amendment. Id. at 607.

In subsequent cases, the Court has made clear that the preclusion of any consideration at all of nonstatutory mitigating factors is just as violative of the Eighth Amendment as the

<sup>18</sup> The three statutory mitigating factors were as follows:

<sup>(1)</sup> The victim of the offense induced or facilitated it.

<sup>(2)</sup> It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

<sup>(3)</sup> The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

<sup>438</sup> U.S. at 607.

extremely limited consideration of nonstatutory mitigating factors that was condemned in Lockett. See Green v. Georgia, 442 U.S. 95 (1979) (exclusion of evidence that a person other than the defendant actually killed the victim of the homicide); Eddings v. Oklahoma, 445 U.S. 104 (1982) (exclusion from the sentencer's consideration of evidence of defendant's family history). In so holding, however, the Court has not receded from its holding in Lockett that the Eighth Amendment is violated by a statute which, though permitting general consideration of nonstatutory mitigating factors, does not permit the consideration of nonstatutory mitigating factors, "as such, to affect the sentencing decision." 438 U.S. at 608.

When these principles are applied to the Lockett claim by Mr. Hitchcock, it is clear that the claim can be made out in either of two ways. First, if the statute's constraint upon counsel prevents counsel from presenting a certain kind of evidence at all because it is a nonstatutory mitigating factor, the Eighth Amendment is violated as it was in Green and Eddings. Through this process, relevant evidence is entirely excluded from the sentencer's consideration. Thus, in the terms used by the court of appeals, if Mr. Hitchcock had shown that counsel's misunderstanding of the statute had prevented him entirely from presenting a certain category of nonstatutory mitigating evidence, the Lockett claim would have been adequately stated. However, the court of appeals erred in holding that this was the only way in which Mr. Hitchcock could state his claim.

Alternatively, if Mr. Hitchcock demonstrated that the statute's constraint upon counsel obliged him to make nonstatutory mitigating points indirectly, by shoehorning them into the mold of statutory mitigating circumstances instead of arguing that the nonstatutory mitigating factors independently called for a life sentence, he would have stated an Eighth Amendment claim precisely as it was stated in Lockett. Through this process, the sentencer would have been precluded from considering relevant

nonstatutory mitigating evidence, just as in Lockett, "as an independently mitigating factor." 438 U.S. at 607. Accordingly, even if Mr. Hitchcock did not claim that counsel would have presented a different kind of evidence but for the constraint of the statute, he nevertheless could adequately state a claim under Lockett if he claimed that counsel would have made a fuller, more focused, and more forceful presentation in mitigation if the unconstitutional rule of state law had not been in effect.

There can be no legitimate question that Mr. Hitchcock at least stated this kind of violation of the Eighth Amendment. Although, as the court of appeals noted, defense counsel's penalty trial argument "referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner turned himself in," 770 F.2d at 1518; App. 5a, he did not argue that this evidence was sufficient, as such, to affect the sentencing decision. He argued only that the jury should consider this evidence "for whatever purposes you deem appropriate," TAS 14, and then argued that some of this evidence helped establish statutory mitigating factors. TAS 21-25. Just as in Lockett, the Florida death penalty statute prevented counsel from presenting the nonstatutory mitigating evidence "as an independently mitigating factor," 438 U.S. at 607.19

Accordingly, the court of appeals erroneously narrowed the rule of <u>Lockett</u> when it held that Mr. Hitchcock had failed to demonstrate a <u>Lockett</u> violation.

By analogy to the cases in which defense counsel represents conflicting interests, Mr. Hitchcock has thus demonstrated that the Lockett-violative application of the Florida statute "adversely affected [the defense] lawyer's performance," Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Mr. Hitchcock does not contend that every capital case tried in Florida before Lockett must be reversed. It is only in those cases where the Lockett-violative application of the statute can be shown to have "adversely affected" the presentation and thus, consideration, of mitigating factors that constitutional relief must be granted. Where such a showing is made, it is "the manner of the imposition of the ultimate penalty," Eddings, 445 U.S. at 116, that is constitutionally flawed. Such a flawed procedure is the concern of the Eighth Amenoment, for it is that procedure that creates the risk of erroneous imposition of the death sentence.

B. The Court of Appeals Erred in Holding that a Plausible and Well-Pleaded Claim that Significant Nonstatutory Mitigating Evidence Was Neither Proffered as Independently Mitigating Nor Fully Presented Because of the State's Unconstitutional Rule of Law, May Be Rejected Without an Evidentiary Hearing

As noted, the court of appeals held that a <u>Lockett</u> error could occur under the circumstances presented by Mr. Hitchcock only if counsel would have presented a different kind of evidence had he not been constrained by Florida's unconstitutional application of its death penalty statute. Having framed Mr. Hitchcock's claim in this fashion, the court affirmed the dismissal of the claim under Rule 4 of the habeas rules since "the record belies the argument" that counsel would have presented a different kind of evidence but for the state's unconstitutional rule of law. 770 F.2d at 1517; App. 4a. While this might have been a valid ground of decision had the <u>Lockett</u> claim been appropriately framed only in this fashion, the <u>Lockett</u> claim was not so limited. Unquestionably, when framed faithfully against the contours of <u>Lockett</u>, Mr. Hitchcock's claim could not have been properly dismissed under Rule 4.

Under the standards plainly set forth by the Court in Blackledge v. Allison, 431 U.S. 63 (1977), a dismissal under Rule 4 is permissible only if: (1) the allegations in the petition are "in themselves so 'vague [or] conclusory' ... as to warrant dismissal for that reason alone," id. at 76; (2) "'tne motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief,'" id. at 74 n.4 (quoting 28 U.S.C. § 2225) (emphasis supplied); or (3) the allegations in the petition are "so 'patently false or frivolous' as to warrant summary dismissal," id. at 78. When properly framed in light of Lockett, Mr. Hitchcock's claim could not have been dismissed under these standards.

Rather than claiming, as the court of appeals held he must, that the constraint of the Florida death penalty statute prevented counsel altogether from presenting a certain kind of

mitigating evidence, Mr. Hitchcock claimed that the Florida statute severely curtailed counsel's development and presentation of mitigating evidence and obliged counsel to shoehorn the limited evidence he did present into the mold of statutory mitigating circumstances. Thus, while counsel did present isolated fragments of what the court of appeals characterized as "the difficult circumstances of petitioner's upbringing," 770 F.2d at 1518; App. 5a, these fragments did not reveal the most powerful influence in Mr. Hitchcock's life -- his "upbringing in an environment of poverty" -- as the court of appeals mistakenly said they did, id., nor did they reveal the uniquely tragic consequences of the death of Mr. Hitchcock's father when he was a young child. 20 Further, Mr. Hitchcock's counsel did not arque that even this severely limited showing of "difficult circumstances" independently warranted a life sentence, but presented it only "for whatever purposes you may deem appropriate," TAS 14. See TAS 13-15. Similarly, while counsel did present, as the Court of appeals observed, some of Mr. Hitchcock's positive character traits which vaguely suggested the prospect of rehabilitation these traits did not begin to paint a full picture of a person who deserved to be spared from execution because of who he

The evidence of "difficult circumstances" that was presented was summarized by counsel as follows: Mr. Hitchcock grew up in a family of seven children supported by his parents picking and hoeing cotton; his father died when he was six or seven years old; and he left home at the age of thirteen in part because he did not get along with his stepfather. TAS 14-15. As alleged in the habeas petition, however, this evidence could, if fully developed, have shown that Mr. Hitchcock's family were tenant farmers living at a bare subsistence level, with food in scarce supply, with flour sack clothing and no indoor plumbing, and with the children working along with their parents in order to survive. Further, the evidence could have shown the deep, lifechanging upheaval suffered by Mr. Hitchcock as a result of his father's death -- that he struggled to rebound from the loss more than did the others, that the loss of the father triggered a breakdown of the family since the fatner had kept the family together and maintained the love relationships within that family, and that when his father was taken from him, Mr. Hitchcock lost his sense of belonging, of family, and of roots.

was.<sup>21</sup> Further, counsel did not argue that these character traits were independently mitigating, TAS 15-17, but tried to snoehorn them into the statutory mitigating circumstance of age and youth. See TAS 23-24 ("there is a chance for this man, who is still young, who is capable [,] to eventually lead a good life").

When analyzed in the way that Mr. Hitchcock presented his claim — and in a way that accurately reflects the principles of Lockett — rather than in light of the court of appeals' fundamental misconstruction of the claim and of Lockett, this claim unquestionably survives a Rule 4 review. Rather than "bel[ying]" the claim, as the court of appeals held, the record supports the claim. The trial court record affirmatively and unequivocally shows that trial coursel acted under the unconstitutional constraints of the Florida death penalty statute, unable to argue the nonstatutory mitigating evidence as independently mitigating and obliged to force this evidence into the mold of statutory

James does not, in many respects, fit the more typical picture of those wno commit violent acts against other individuals.... He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression.... If James' sentence were commuted and he were to be in 'population,' there is every reason to believe that not only would he function well but he would be a positive influence.... [H]e is bright, articulate, capable of insight....

(Emphasis supplied.)

mitigating circumstances. 22 Moreover, the allegations of the habeas petition show what the trial record points to: that counsel felt constrained to argue to the jury that only the statutory mitigating circumstances could be considered, as such, in determining the sentence, and that, in the absence of such constraint, counsel not only could have argued that the nonstatutory mitigating evidence itself could support a life sentence, but also could have presented much more fully developed and persuasive evidence of the nonstatutory mitigating factors that were tentatively and fragmentarily adduced at the trial. These allegations unequivocally demonstrate "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is [sentenced to death] illegally and is therefore entitled to relief .... Harris v. Nelson, 394 U.S. 286, 300 (1969). Upon such allegations, a Rule 4 dismissal is improper, for "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Id.

Despite the court of appeals' statement that Mr. Hitchcock's "solid character traits, devotion to hard work, [and] willingness to contribute to the family's support" were "[a]11 ... developed ... to some extent for the jury," 770 F.2d at 1518; App. 5a, the record clearly reveals otherwise. With respect to the qualities of Mr. Hitchcock's character, counsel presented -- again only in a minute way -- evidence of Mr. Hitchcock's nonviolent character, obedience as a child, and honesty. See TAS 15-17. As alleged in the habeas petition, many additional positive traits of character could have been shown, including Mr. Hitchcock's devotion to hard work, generosity, genuine concern for others, and willingness to sacrifice himself for his family and for others. Moreover, direct evidence of his good prospects for rehabilitation could have been presented instead of the mere interences that were argued by counsel. A psychologist experienced in evaluating persons in prison could have presented these findings as follows:

The court of appeals' opinion, in one respect, suggests that the record does contradict Mr. Hitchcock's claim even when that claim is accurately framed. The court of appeals suggests that counsel did argue that the nonstatutory mitigating evidence could be used independently to suport a life sentence when counsel argued to the jury to

look at the overall picture. You are to consider every thing together ... consider the whole picture, the whole ball of wax.

<sup>770</sup> F.2d at 1518; App. 5a. This suggestion is misleading, however. An examination of the transcript where that quoted argument appears, TAS 49-52, reveals plainly that it was an effort to rebut the prosecutor's argument that the jury should use "mathematics" to compute the verdict by summing the number of statutory aggravating and mitigating factors, TAS 43-44. Defense counsel did not refer to any nonstatutory mitigating factors in the argument, but rather was merely trying to describe the weighing process of the Florida capital sentencing scheme. The en banc majority's quotation of that argument is thus so out of context that it is extremely misleading. It does not contradict Mr. Hitchcock's claim.

# C. The Court of Appeals Further Erred by Retroactively Applying a Novel Procedural Rule to Deny an Evidentiary Bearing

The court of appeals placed determinative emphasis upon the detail of the "post-trial affidavit[]... of trial counsel." In support of its holding that "the record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different," the majority below parsed trial counsel's affidavit, finding that it "does not indicate ... that [counsel] would have done anything differently at that time" had he not believed that he was constrained by the statute. 770 F.2d at 1517; App. 4a. Based upon this finding, the court of appeals denied Mr. Hitchcock an evidentiary hearing. Apart from the misperception of Lockett discussed above and accepting the narrow claim framed by the court of appeals, it was independent error to adjudicate the Lockett claim by applying procedures first explicted in the Hitchcock opinion without providing Mr. Hitchcock a fair opportunity to meet this new procedural rule.

At the time of making that affidavit no standards had been announced for such affidavits nor had there ever been any indication that an affidavit was needed or that it would be relied upon to the exclusion of the allegations set forth in the petition itself. The affidavit in this case was submitted simply as a proffer in the appendix to petitioner's motion for evidentiary nearing only to show that there was evidence that required development at an evidentiary hearing as required by <a href="Blackledge">Blackledge</a> v. Allison, 431 U.S. 63 (1977). Despite the novelty of the court of appeals' procedural rule, it did not provide Mr. Hitchcock the opportunity to present supplemental affidavits.

As the Court taught in <u>Blackledge</u>, a habeas litigant "should not be required to prove his allegations in advance of an evidentiary hearing, at least in the absence of counter affidavits conclusively proving their falsity." <u>Id</u>. at 70. Moreover,

such a burden even if appropriate should not be adopted retroactively. Thus, in <u>Blackledge</u> the magistrate's direction to the petitioner to obtain affidavits to support his claim

imposed upon Allison a novel and formless burden of supplying proof ... without any intimation that dismissal would follow if that burden were not met. It thus can hardly be said that Allison was granted a "full opportunity for presentation of relevant facts."

Id. at 83 n.6 (emphasis supplied). Yet the court of appeals has done just what Blackledge decried. It adjudicated Mr. Hitchcock's Lockett claim by applying procedures first explicated in the en banc Hitchcock opinion to an affidavit made before these procedures were explicated, and before it was known that affidavits of trial counsel would be used as the basis for adjudicating such claims in the way that the en banc Hitchcock opinion used them. Mr. Hitchcock should not be bound to a record made before the requirements for affidavits of this kind had been clarified by the Court. 23

Moreover, had Mr. Hitchcock been provided the opportunity to meet that new rule, he could have done so. On rehearing from the en banc opinion, Mr. Hitchcock expressly sought the opportunity to submit supplemental affidavits to address the novel procedural rule of that opinion. In support of this request he proffered exemplary affidavits -- from the attorneys who had taken trial counsels initial affidavit and an additional affidavit by trial counsels.

The affidavits of the attorneys who drafted and secured the original affidavit from trial counsel state that they "did not ask counsel to address [the] question in the affidavit" of

<sup>23</sup> Cf. Smith v. Yeager, 393 U.S. 122 (1968) (habeas petitioner who litigated petition prior to announcement of standards for granting evidentiary hearing not barred from litigating a second petition on the same grounds but under the subsequently explicated standards). If an administrative agency employed a similar procedure for adjudicating a party's rights on the basis of a record made by attorneys who were justifiably without "awareness of the ... argument to be justifiably without "awareness of the ... argument to be countered," Gonzales v. United States, 348 U.S. 407, 415 (1955), no court would hesitate to find that due process of law had not been afforded to that party. See, e.g., Morgan v. United States, 304 U.S. 1 (1938); Willner v. Committee on Character and Fitness, 373 U.S. 96, 104-105 (1963). The same would be true if a state appellate court employed such a procedure. See Cole v. Arkansas, 333 U.S. 196 (1948); Presnell v. Georgia, 439 U.S. 14 (1978).

whether he "would have acted differently if he had not been under the misimpression that consideration of mitigating factors was limited to those enumerated in the Florida statute." They did not do so because "[a]t the time of the taking of the affidavit ... [they] did not conceive that the affidavit would be used as the basis for adjudicating [the] claim on the merits." They intended the affidavit "only to satisfy the Blackedge v. Allison ... requirement of demonstrating that there was evidence that required development at an evidentiary hearing."

Moreover, the supplemental affidavit by trial counsel confirms that he was not asked to address in his original affidavit whether "he would have done anything differently at that time." Counsel further confirms that he was acting under the belief that consideration of mitigating circumstances was limited to those set out in the statute and that his belief did affect the way in which he presented the penalty phase defense of Mr. Hitchcock. For example,

I would have argued to the jury that Mr. Hitchcock's family history and childhood background were independent mitigating factors concerning "other aspects of the defendant's character or record, and any other circumstances of the offense."

Further, with regard to evidence of childhood background and potential for rehabilitation, counsel stated that he, "would nave presented such evidence, had that evidence been available to me and had I known the legal right to do so."

Thus, the court of appeals' retroactive application of its novel procedural rule was improper and hence insufficient to avoid the significant constitutional issue that is presented by this case.

THE IMPOSITION OF A DEATH SENTENCE BY THE COURT AFTER IT HAD OFFERED MR. HITCHCOCK A LIFE SENTENCE, WITHOUT AN APFIRMATIVE SHOWING ON THE RECORD TO JUSTIFY THE "QUALITATIVELY" ENHANCED PENALTY IMPOSED AFTER MR. HITCHCOCK EXERCISED HIS FUNDAMENTAL RIGHT TO TRIAL BY JURY, VIOLATES THE DUE PROCESS CLAUSE AND EIGHTH AMENDMENT GUARANTEES OF FAIRNESS AND RELIABILITY

before Mr. Hitchcock exercised his right to trial by jury, the prosecutor and the trial judge decided that only a life sentence was necessary in this case. There was no need to put Mr. Hitchcock to death. This is shown by the offer to Mr. Hitchcock by the prosecutor and the judge that if Mr. Hitchcock would plead nolo contendere to the charge, he would be sentenced to life imprisonment -- nis life would be spared. Mr. Hitchcock declined the offer and chose instead to exercise his right to trial by jury. After that trial, the judge imposed a sentence of death, without stating or making the record affirmatively show his reasons for imposing this "qualitatively" enhanced sentence after the exercise of a fundamental right. 24

The question in this case involves the constitutional propriety of such a process of selecting Mr. Hitchcock as one of the few who must die from the many who will not. It is a question of fairness and the appearance of fairness under the Due Process Clause, and of rationality and reliability as demanded by the Eighth Amendment. The reasons that the situation in this case does not represent the usual breakdown in negotiations that occurs daily in the criminal courts are twofold. First, it is the court that was involved in the life-sentence offer and not merely a prosecutor acting within an adversary system. This fact brings to bear the due process standards of North Carolina v. Pearce, 395 U.S. 711 (1969). Second, the death penalty is involved in this case. This fact incorporates the uniquely coercive nature of the death sentence explained by the Court in

These facts are as alleged by Mr. Hitchcock below. Both the district court and the en panc majority treated this question as a matter of law and therefore accepted petitioner's facts as true, i.e., that the judge would have sentenced Mr. Hitchcock to life had he entered a plea to the charge. 770 F.2d at 1518. App. 5a.

United States v. Jackson, 390 U.S. 570 (1968), and the Eighth Amendment mandates of heightened reliability and of rationality and the appearance of rationality as articulated in Gardner v. Florida, 430 U.S. 349 (1977) as well as other decisions.

North Carolina v. Pearce, supra, involved the imposition of a greater penalty on the defendant upon retrial after he had exercised his right to appeal his conviction. The Court found no absolute double jeopardy bar to a greater penalty, but did find that the Due Process Clause imposed certain restrictions:

Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726 (emphasis supplied). The rule of <u>Pearce</u>, therefore, is that imposition of a harsher punishment after the exercise of a legal right must be supported by an affirmative showing of the judge justifying the harsher penalty. Due process requires such an affirmative showing in order to preclude a penalty being exacted and the appearance or "apprehension" of such a penalty for the exercise of a fundamental right which would deter the defendant's exercise of that right. <u>Id</u>. at 725. It is the court's imposition of an enhanced penalty after the exercise of a right that triggers the due process requirements.

The closely-divided en banc court based its rejection of Mr. Hitchcock's due process claim on its reasoning that as a matter of law Pearce "does not apply to the failure of a plea bargain."

770 F.2d at 1518; App. 5a. The majority held that "[i]n the 'give-and-take' of plea bargaining, the state may extend leniency to a defendant who pleads guilty foregoing his right to a jury trial." Id. Such reasoning is too facile, however, for it fails to acknowledge the need to examine the particular situation under the objectives of Pearce in order to determine the applicability of the Pearce standards. In particular the en banc majority

failed to account for the qualitative difference of the death penalty — while it may be permissible to offer a defendant a reduced prison term for giving up his right to a trial, it is not permissible to offer him his very life for doing so. Just as significantly, the court of appeals also failed to consider that this case concerns involvement of the court, not simply the prosecution in the "give-and-take of plea bargaining." These factors are critical in determining the applicability of <a href="Pearce">Pearce</a>.

Most recently, in Texas v. McCullough, \_\_\_ U.S. \_\_\_, 106 S.Ct. 976 (1986), the Court explained the considerations to be followed in determining whether the Pearce presumption is applied to a particular situation. The Court iterated that "Pearce (is applied] to areas where its 'objectives are thought most efficaciously served.'" 106 S.Ct. at 979 (quoting Stone v. Powell, 428 U.S. 465, 487 (1976)). Thus, the Court explained, "in each case, we look to the need under the circumstances, to 'guard against vindictiveness in the sentencing process.'" 106 S.Ct. at 979 (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 25 (1973)). The Pearce presumption applies where there is a "justifiable concern about 'institutional interests that might occasion higher sentences by a judge desirous of discouraging appeals.'" 100 S.Ct. at 979 (quoting Chaffin, 412 U.S. at 27). Thus, situations where there is a "realistic motive for vindictive sentencing" or an "apprehension of retaliatory motivation on the part of the sentencing judge, " the Pearce presumption is appropriate. 106 S.Ct. at 980.25

The instant situation, where a defendant about to be put on trial for his life is offered his life by the court if he will forego his right to trial, presents the "justifiable concern,"

Therefore, although approving the increased sentence after the granting of a motion for new trial, the Court in Mc-Cullough emphasized that different sentencers were involved (at the defendant's request) and that the judge had specifically stated that the increased sentence was based upon new information not available during the first trial. Neither of these situations apply to Mr. Hitchcock's case.

"apprehension," and "realistic motive" that <u>Pearce</u>'s prophylactic rule was intended to reach. And where a detendant receives a death sentence after exercising his right to trial, <u>Pearce</u>'s requirement of an affirmative record showing of the reasons justifying an increased sentence is the only constitutional protection.

It is black letter law that the right to trial by jury is a fundamental right, <u>Duncan v. Louisiana</u>, 391 U.S. 145, 158 (1968), and that criminal defendants may not be penalized for the exercise of constitutional rights. 26 "The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand and receives a greater punishment. "27

Thus, a court may not penalize a defendant for exercising his constitutional right to stand trial. The ninth circuit has accordingly held that therefore when the court has been involved in plea bargaining the record must affirmatively show that no weight was given to the refusal to plead guilty:

[0] nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty.

United States v. Stockwell, 472 F.2d 1186, 1187-8d (9th Cir.
1973). See also Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974).

The key fact requiring the application of the <u>Pearce</u> standards to the situation in the present case is that it is the <u>court</u> that has offered the sentence before trial and increased that sentence after the exercise of the right to trial. This was the fact that caused <u>Pearce</u> to be decided the way that it was. The situation of the decisionmaker offering a sentence to a defendant before trial and then increasing it after trial is at the far pole from a prosecutor working within an adversary system seeking a higher charge or sentence after the breakdown of negotiations.

It is the court's involvement that differentiates this case from the situation in Bordenkircher v. Hayes, supra that was relied upon by the en banc majority. In that case the Court approved a process where the prosecutor filed an additional habitual felony charge against the defendant after the defendant declined the prosecutor's plea bargain. 434 U.S. at 358-59. The Court saw controlling significance in the fact that it was not the "State's unilateral imposition of a penalty upon a defendant who had chosen to exercise a legal right" that was involved -- "a situation 'very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power.'" Id. at 362 (quoting Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting)). Thus, at the base of Bordenkircher is the fact that the ultimate decisionmaker was not involved -- it was not a "unilateral" imposition of a penalty -but rather only an "equal" negotiator. 28

See United States v. Jackson, 390 U.S. at 581; Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"). From these two principles follow the command that "the Constitution forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial." Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981).

United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir. 1973). See also Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Derrick, 519 F.2d 1 (6th Cir. 1975); Poteet v. Fauver, 517 F.2d 393 (2d Cir. 1975); Baker v. United States, 412 F.2d 1069 (5th Cir. 1969).

<sup>28</sup> That Bordenkircher rested upon this give-and-take of adversaries for its approval is further demonstrated by Justice Stewart's concurring opinion in Corbitt v. New Jersey, 439 U.S. 212 (1978). Justice Stewart, the author of Bordenkircher, filed a concurring opinion in Corbitt to emphasize that Bordenkircher had "involved plea negotiations between the attorney for the prosecution and the attorney for the defense in the context of an adversary system." 439 U.S. at 227 (Stewart, J., concurring). In Corbitt the Court approved a statutory scheme where a defendant who went to trial and was convicted of first degree murder received a mandatory life sentence, whereas one who entered and had accepted a plea of nolo contendere could receive a lesser sentence. Again, Corbitt did not involve the ultimate decisionmaker making an offer of a sentence and then increasing it after the exercise of a right.

Judge Wisdom's opinion in <u>Brown v. Beto</u>, 377 F.2d 950 (5th Cir. 1967) sets out the dangers inherent in a court's involvement in plea bargaining:

"The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and if convicted, he faces a significantly longer sentence."

1d. at 957 n.4 (quoting United States ex rel. Elkonis v. Gilligan, 256 F.Supp. 244, 254 (S.D.N.Y. 1966)). There is thus a powerful difference between ordinary bargaining and bargaining in which the trial judge, the ultimate sentencer, is involved. The appearance of impropriety is a very real danger. In United States v. Adams, 634 F.2d 830 (5th Cir. 1961), the court found that a court's participation in plea bargaining "surely affects 'the fairness, integrity or public reputation of judicial proceedings.'" Id. at 836. Though Adams was decided under F.R.Crim.P. 11, id. at 836 n.3, its discussion of the dangers inherent in sentencing by a judge who has participated in unsuccessful plea negotiations points to at least a Pearce-like constitutional rule in capital cases. "[J]udicial participation in plea negotiations is likely to impair the trial court's impartiality." Id. at 840. See also United States v. Werker, 535 F.2d 198, 202 (2d Cir. 1976).

It is plain from this discussion that the situation presented by this case carries the same dangers that led the Court in <a href="Pearce">Pearce</a> to require that the judge affirmatively show the reasons for an increased sentence after the defendant's exercise of a fundamental right. The appearance of impropriety is enough to call for the <a href="Pearce">Pearce</a> requirements.

There is one other factor that influences the resolution of this issue in this case and further demands the application of <a href="Pearce">Pearce</a>'s due process mandate. That overriding factor is that this case involves the imposition of the death sentence.

In considering issues regarding permissible plea bargaining practices, the Court has been especially careful to carve out a different rule for capital cases than for noncapital cases. See United States v. Jackson, 390 U.S. 570 (1968). In Corbitt v. New Jersey, 439 U.S. 212 (1978) the Court approved a practice of extending leniency in return for a guilty plea in noncapital cases but carefully distinguished capital cases because "the death penalty, which is 'unique in its severity and irrevocability,' ... is not involved here." (citation omitted) Id. at 217. The en banc court overlooked this express distinction in its reliance upon Corbitt to reject Mr. Hitchcock's claim.

Capital cases carry their own set of governing constitutional principles that distinguish them from noncapital cases, including the greater need for reliability, the need for specific and detailed channeling of discretion, and the need for individualized sentencing. The fundamental requirement that the "decision to impose the death sentence be, and appear to be, based upon reason," Gardner v. Florida, 430 U.S. at 35d, is not met where a court determines before trial that a life sentence is appropriate, but after trial imposes the death sentence with no pretense of justification for increasing the penalty by such a qualitative leap.

Additionally, the unique power of the death penalty to coerce pleas and thus to chill and distort the right to trial was fully recognized by the Court in <u>United States v. Jackson</u>, <u>supra</u>, and <u>Corbitt v. New Jersey</u>, <u>supra</u>. In <u>Jackson</u> the Court held a statute unconstitutional because it made "the risk of death the price for asserting the right to jury trial, and thereby impairs ... free exercise of that constitutional right." 390 U.S. at 571. Because under the statute "assertion of the right to jury trial may cost him his life," <u>id</u>., the Court saw the issue before it as "whether the Constitution permits the establishment of such a

death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the Sixth Amendment right to demand a jury trial." Id. at 581. "The question is not whether the chilling effect is incidental rather than intentional; the question is whether that effect is unnecessary and therefore excessive." Id. at 582. "[T]he evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers, but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of constitutional rights." Id. at 583.

Regardless of the propriety of the prosecutor penalizing a defendant for exercising his right to trial, no court until now has ever extended such reasoning to a court's offering of a lighter sentence before trial. And even if it were proper for a court to become involved in plea bargaining and extend a benefit to an accused for foregoing trial in noncapital cases, such a process has never before been approved by any court where the unique penalty of death is involved. Yet by its decision in this case, the court of appeals made both precedent-breaking rulings. Such leaps of law must be redressed by the Court, because the status of the law requires it and the dual concepts of rationality and fairness underlying the Eighth and Fourteenth Amendments demand it.

IV.

THE COURT OF APPEALS HAS INCONSISTENTLY RULED UPON THE SIGNIFICANT EIGHTH AND POURTEENTH AMENDMENT QUESTION CONCERNING THE ARBITRARY AND DISCRIMINATORY APPLICATION OF THE DEATH PENALTY IN PLORIDA ON THE BASIS OF RACE AND OTHER IMPERMISSIBLE FACTORS

Mr. Hitchcock alleged in his petition for writ of habeas corpus that the death penalty in Florida is being administered in a discriminatory and arbitrary manner on the basis of race of the defendant and victim, geography, gender, and socio-economic status. In support of his claim, Mr. Hitchcock proffered all of

the then-available studies concerning the actual application of the death penalty in Florida and elsewhere, <sup>29</sup> and requested an evidentiary hearing, discovery and funds for expert assistance.

The district court summarily dismissed the claim under Rule 4, reasoning that under Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) a challenge to the application of a facially constitutional statute was foreclosed "as a matter of law." R 1192; App. 64a. The panel of the court of appeals likewise denied relief, relying upon citation to the opinions in the successive habeas proceedings in Sullivan v. Wainwright, 464 U.S. 109 (1983); and Wainwright v. Ford, \_\_\_\_ U.S. \_\_\_\_, 104 S.Ct. 3498 (1984). 745 F.2d 1342; App. 27a. The en banc court reinstated the panel opinion as to this claim. 770 F.2d 1516; App. 3a.

There is, however, confusion in the law as announced by the court of appeals. After the panel opinion in this case, the court of appeals announced its decision in <a href="McClesky v. Kemp">McClesky v. Kemp</a>, 753 F.2d 877 (11th Cir. 1985) (en banc) in which it set forth new standards for evaluating claims of arbitrariness in the application of the death penalty. Thereafter, in a Florida case where the petitioner challenged the arbitrary application of the death penalty, based on the same studies upon which Mr. Hitchcock's claim is based the court of appeals ordered that because of the

<sup>29</sup> At the time of the filing of the federal habeas corpus petition, Mr. Hitchcock presented an unpublished study by William Bowers and Glenn Pierce that had been presented through their testimony in the case of Henry v. Wainwright before the same district court judge (appendix A in the district court) and a study by Dr. Linda Foley entitled Florida After the Furman Decision: Discrimination in the Processing of Capital Offense Cases (appendix B in the district court). During the pendency of the habeas petition in the district court, the manuscript draft of a new, far more comprehensive study became available and was furnished to the district court in July, 1983. That study is now published as Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (Nov. 1984). Since the district court proceedings in Mr. Hitchcock's case, additional studies have been published: Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 L. Soc'y. Rev. 587 (1985); Foley & Powell, The Discretion of Prosecutors, Judges, and Juries in Capital Cases, 7 Crim. Just. Rev. 16 (1982). See also Gross, Race and Death: The Judicial Evaluation of Discrimination in Capital Sentencing, 18 U.C.D. L. Rev. 1275 (1985); Baldus, Woodworth & Pulaski, Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia, 18 U.C.D. L. Rev. 1375 (1985).

intervening announcement of new standards in McClesky, the claim had to be remanded to the district court for reconsideration in the light of those standards. Griffin v. Wainwright, 760 F.2d 1505, 1518 (11th Cir.), reh. en banc den., 770 F.2d 1084 (11th Cir. 1985). Petitions for writ of certiorari are presently pending before the Court as to both of those intervening decisions. Wainwright v. Griffin, No. 85-801, pet. for cert. filed, October 16, 1985; McClesky v. Kemp, No. 84-6811; pet. for cert. filed, May 28, 1985. Those cases have set out in detail the factual and legal premises for the claim and thus petitioner will not burden the Court with further discussion.

Since the court of appeals has decided Mr. Hitchcock's claim in a manner directly contrary to its decision in <u>Griffin v. Wainwright</u>, and because the claim concerns a significant constitutional question as to the application of the death penalty, review by the Court is necessary for a fair and consistent resolution.

#### CONCLUSION

For these reasons, petitioner prays that the Court issue its Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

RICHARD L. JORANDBY Public Defender 15th Judicial Circuit of Florida 224 Datura Street/13th Floor West Palm Beach, Florida 33401 (305) 837#2150

CRAIG S. BARNARD Chief Assistant Public Defender

RICHARD H. BURR III Assistant Public Defender

Counsel for Petitioner

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# EDITOR'S NOTE

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RECEIVED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

kespondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## APPENDIX

RICHARD L. JORANDBY Public Defender 15th Judicial Circuit of Florida 224 Datura Street/13th Floor West Palm Beach, Florida 33401 (305) 837-2150

CRAIG S. BARNARD Chief Assistant Public Defender

RICHARD H. BURR III Assistant Public Defender

Counsel for Petitioner

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### APPENDIX

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James Ernest HITCHCOCK. Petitioner-Appellant.

Louie L. WAINWRIGHT, Respondent-Appellee.

No. 83-3578.

United States Court of Appeals, Eleventh Circuit.

Aug. 28, 1985.

Florida death row inmate sought federal habeas relief. The United States District Court for the Middle District of Florida, John A. Reed, Jr., J., denied writ, and petitioner appealed. The Court of Appeals, 745 F.2d 1332, affirmed, and vacated for rehearing en banc. On rehearing, the Court of Appeals, Roney, Circuit Judge, held that. (1) Florida law was not shown to have unconstitutionally discouraged petitioner's trial counsel from investigating and presenting nonstatutory mitigating evidence, and (2) sentencing judge was not required to set forth reasons why sentence imposed after trial was greater than life

sentence that would allegedly have been 5. Criminal Law \$986.2(6) approved on guilty plea.

#### Affirmed.

opinion in which Clark, Circuit Judge, trial than that offered in plea bargain. joined, and in which Godbold, Chief Judge, Kravitch and R. Lanier Anderson, Circuit Judges, joined in part.

### 1. Habeas Corpus \$\infty 45.2(8)

In habeas corpus proceeding, Florida law was not shown to have unconstitutionally discouraged petitioner's trial counsel from investigating and presenting nonstatutory mitigating evidence, in that petitioner failed to show that trial counsel's presentation to the jury would have been appreciably different had it not been for possible confusion of petitioner's attorney as to the law on mitigating circumstances, and in that nonmitigating factors which petitioner contended should have been presented in greater detail were developed to some extent for the jury. West's F.S.A. § 921. 141(6ab).

### 2. Criminal Law =273.1(2)

In "give-and-take" of plea bargaining. state may extend leniency to defendant who pleads guilty and foregoes his right to jury trial U.S.C.A Const.Amend 6.

### 3. Criminal Law (=273.1(2)

Legislative schemes which extend possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden assertion of constitutional rights or act to coerce inaccurate guilty pleas. U.S.C.A. Const. Amend. 6.

#### 4. Criminal Law (\$273.1(2)

A judge, as much as prosecutor and legislature, should not be precluded from approving leniency in sentencing upon admission of guilt. U.S.C.A. Const.Amend. 6.

Circuit Judge Joseph W. Hatchett, having re-cused himself, did not participate in this deci-sion. Senior Circuit Judge Lewis R. Morgan

Absent demonstration by defendant of judicial vindictiveness or punitive action, defendant may not complain simply be-Johnson, Circuit Judge, filed dissenting cause he received heavier sentence after

#### 6. Criminal Law =986(3)

In capital murder prosecution, sentencing judge was not required to set forth reasons why death sentence imposed after trial was greater than life sentence that would allegedly have been approved on guilty plea.

### 7. Criminal Law 4986(3), 986.2(6)

Trial court which approved sentence based on plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, or impose such sentence only for conduct occurring after aborted plea bargaining.

Richard B. Greene, Richard H. Burr, Craig Barnard, West Palm Beach, Fla., for petitioner-appellant.

Richard Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent-appellee.

Appeal from the United States District Court for the Middle District of Florida

Before GODBOLD, Chief Judge, RO-NEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge."

#### RONEY. Circuit Judge:

This case was taken on rehearing en banc principally to consider two of several constitutional claims raised by petitioner James Ernest Hitchcock. He asserts (1) that at the time of his capital sentencing. Florida law unconstitutionally discouraged his attorney from investigating and presenting nonstatutory mitigating evi-

elected to participate in this decision pursuant to 28 U.S.C. 6 46(c)

## 770 FEDERAL REPORTER, 24 SERIES

dence, and (2) that the trial court improperly considered petitioner's refusal to plead guilty in imposing a death sentence. The district court denied all claims raised by Hitchcock without conducting an evidentiary hearing. We affirm.

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In January 1977, Hitchcock was convicted and sentenced to death for the murder of his brother's thirteen-year-old stepdaughter. The Florida Supreme Court affirmed his conviction and sentence. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 960, 74 L.Ed.2d 213 (1982). The denial of Hitchcock's state post-conviction motion to vacate judgment and sentence was likewise affirmed. Hitchcock r. State, 432 So.2d 42 (Fla 1983). After his federal petition for habeas corpus was denied by the district court. Hitchcock raised five issues on appeal. The panel opinion, one judge dissenting on two issues, affirmed the denial of relief as to all issues. Hitchcock r. Wainwright, 745 F.2d 1332 (11th Cir 1984), raented for ring en bane, 745 F.24 1345 (11th Cir 1985)

With respect to his claims on sufficiency of the evidence, arbitrariness of the death penalty in Florida, and the Brown issue decided in Ford v. Strickland, 696 F 2d 804 (11th Cir.) (en bane ), cert. denied. - U.S. - 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). we now reinstate the sections of the panel opinion denying relief. Although closely following the panel discussion, we set forth fully in the opinion for the en bane court the reasons for rejecting Hitchcock's other two claims.

## 1. Restriction of Mitigating Evidence.

[1] The confusion in Florida law surrounding nonstatutory mitigating evidence in capital sentencing has been discussed at the Florida Supreme Court, see Spinkellength in prior decisions of this Court. Hitchcock v. Wainwright, 745 F.2d 1332. 1335-37 (11th Cir.1984): Ford r. Strick- 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); as a land, 696 F.2d 804, 813 (11th Cir.1983) (en claim that counsel was ineffective in failing banc), cert. denied. - U.S. -, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983): Proffitt v. gating evidence, see Proffitt v. Warn-Wainwright, 685 F.2d 1227, 1238-39 (11th wright, 685 F.2d 1227, 1248 (11th Cir.1982). Cir. 1982). cert. denied. - U.S. -. 104 cert. denied. - U.S. -. 104 S.Ct. 508.

S.Ct. 508, 78 L.Ed.2d 697 (1983); see also Songer v. Wainwright, - U.S. - 105 S.Ct. 817, 819-22, 83 L.Ed.2d 809, 812-14 (1985) (Brennan, J., dissenting from denial of certiorari). In summary, for six years after the Florida death penalty statute was reenacted in 1972, there was some ambiguity as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors enumerated in the statute. The opinions cited above set forth the manner in which this uncertainty first arose in State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), and was exacerbated by Cooper v. State, 336 So.2d 1133 (Fla.1976), cert. denied, 431 U.S. 925 97 S.Ct. 2200, 53 L.Ed 2d 239 (1977). The confusion was finally alleviated in Songer p. State, 365 So.2d 696 (Fla 1978), cert denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), after the United States Supreme Court had ruled in Lockett r Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954. 2964, 57 L.Ed.2d 973 (1978) that "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record

A number of Florida prisoners sentenced to death before Songer was decided have since sought constitutional relief, claiming that the confusion in Florida law inhibited investigation, presentation, and consideration of nonstatutory mitigating evidence at their capital sentencing. The basic legal problems have been addressed in a variety of contexts as a Lockett challenge to the facial constitutionality of the death penalty statute itself as interpreted in Cooper by link r. Wainwright, 578 F.2d 582, 620-21 (5th Cir.1978), cert. denied, 440 U.S. 976. to investigate or present nonstatutory mitiwright, 571 F.Supp. 1384, 1393-97 (M.D. Fla 1983), affd, 733 F.2d 788, 791 n. 2 (11th Cir. 1984), cert. denied. - U.S. -, 105 S Ct 817, 83 L.Ed 2d 809 (1985); as a challenge to jury instructions as restricting the scope of mitigating evidence to that enumerated in the statute, see Ford v. Strickland. 696 F.2d 804, 813 (11th Cir.) (en bone) cert. denied. - U.S. -, 104 S.Ct. 201. 78 L.Ed.2d 176 (1983); Foster v. Strickland, 707 F.2d 1339, 1346-47 (11th Cir. 1983), cert. denied. - U.S. - 104 S.Ct. 2375, 80 L. Ed.2d 847 (19r4); and Songer v. Wainwright, 733 F 2d 788, 792 (11th Cir. 1984): and as a claim arising under Lockett r. Ohio that Florida law as applied discouraged and prevented introduction of available nonstatutory mitigating evidence. See Hitchcock v. Wainwright, 745 F.2d 1332. 1335-37 (11th Cir.1984); see also Songer v. Wainwright, - U.S. -, 105 S.Ct. 817, 817, 83 L.Ed.2d 809, 810 (1985) (Brennan, J., dissenting from denial of cer-

To date, this Court has considered these claims on a case-by-case basis, evaluating the impact of Florida law on each individual petitioner's capital sentencing hearing. We now reaffirm that approach. The en banc Court has determined that an analysis should be made in each case presented to evaluate a petitioner's claim on the particuiar facts of the case. A court should consider the status of Florida's law on the date of sentencing, the record of the trial and sentencing, the jury instructions requested and given, post-trial affidavits or testimony of trial counsel and other witnesses, and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing. In some cases, full and fair consideration of the claim will necessitate an evidentiary hearing. Although generally an evidentiary hearing on the issue is preferable, in some cases, such as the one before us, the record will be suffi- he left home when he was thirteen because cient to support a decision in the absence of the could not tolerate seeing his stepfather an evidentiary hearing.

Florida law did not limit what evidence was not a violent person. During closing

78 L.Ed.2d 697 (1983) and Songer r. Wain-could be produced in mitigation at the penalty stage and that the record indicated petitioner's attorney did not think he was constrained by the statute.

The evidence proffered to the district court does not establish the right to constitutional relief. Although there was a proffer of evidence that the trial attorney may have been mistaken about Florida law, the record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

Petitioner submitted an affidavit of the attorney, a public defender, who represented him at trial and sentencing. The affidavit of the attorney is carefully written. It states that although the attorney does not have an independent recollection, he is of the opinion, upon reviewing the transcript, that during his representation of petitioner his perception was that consideration of mitigating circumstances was limited to the factors enumerated by the statute. It says he is aware of the current status of the case and that evidence of relevant mitigating circumstances was not investigated or presented in petitioner's sentencing trial The affidavit does not indicate, however, that he would have done anything differently at that time.

At the sentencing hearing, petitioner's attorney called petitioner's brother, James, who testified about petitioner at the age of five or six, about his father's death, about the farm work of both the mother and the father hoeing and picking cotton in Arkansas, that there were seven children in the family, and that he left "Ernie" to babysit with the brother's small children. Other testimony relating to petitioner's character had come out at trial. Petitioner testified abuse his mother. His mother testified In the instant case, the district court that he was a good child and he minded dismissed this claim on the grounds that her. Three of his siblings told the jury he argument the attorney referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner voluntarily turned himself in. Finally, he admonished the jury to "look at the overall picture. You are to consider everything together ... consider the whole picture, the whole ball of wax."

Petitioner has suggested several different pieces of evidence of nonstatutory mitigating circumstances which might have been presented. First, he argues that testimony by psychologists could have been introduced which would have corroborated lingering doubts about guilt and shown petitioner was an excellent candidate for rehabilitation. Such testimony would tend to establish his innocence, he says, by bringing out that he had coped with stressful situations throughout his life by retreating or escaping. There is no indication in this record, however, that the attorney at the time of sentencing would have followed this course even if he had known he could. Such matters are not judged from hindsight. Strickland v. Washington, 466 U.S. 668. - 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). It should be noted that mental and emotional conditions are statutorily permitted mitigating considerations. Fla Stat. Ann. § 921.141(6)(b). Petitioner has cited us no cases holding that the mere failure to investigate or produce psychological or psychiatric evidence renders a sentencing proceeding unconstitutional.

Petitioner argues that greater details as to his upbringing in an environment of extreme poverty, his solid character traits, devotion to hard work, willingness to contribute to the family's support, and respect for adults should have been presented as evidence of nonstatutory mitigating factors. All of this was developed, however, to some extent for the jury. As described above, elements of petitioner's character and other background information were testified to by petitioner's brother, sisters, and mother as well as by petitioner himself. Petitioner's trial counsel

reminded the jury of these facts during closing argument in the penalty phase.

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It thus appears that petitioner was not denied an individualized sentencing hear-

11. Life Sentence Offered for Guilty Plea-Death Sentence Imposed After Conviction.

Petitioner asserts that the state trial judge imposed the death sentence as punishment for petitioner's decision to go to trial rather than plead guilty. Petitioner alleged that the prosecutor and the judge together offered him a plea bargain which would exchange his plea of guilty for a life sentence. Petitioner declined the offer. After trial, the judge on the jury's recommendation sentenced petitioner to death Petitioner argues his death sentence must be overturned because the trial judge's sentencing order did not explain why death became an appropriate penalty after trial

The record is unclear as to whether the trial judge indicated he would approve a life sentence on guilty plea, or merely would consider it. We treat the case as if the defendant would have received a life sentence on a guilty plea.

[2-4]. Although the principle of law that petitioner argues would apply on retrial and resentencing after a successful appeal. North Carolina v. Pearce, 395 U.S. 711. 726, 89 S.Ct. 2072, 2081, 23 L.Ed 2d 656 (1969): Blackledge v. Perry, 417 U.S. 21. 28-29, 94 S.Ct. 2098, 2102-03, 40 L.Ed 2d 628 (1974), it does not apply to the failure of a plea bargain. Bordenkircher t. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). In the "give-andtake" of plea bargaining, the State may extend leniency to a defendant who pleads guilty foregoing his right to jury trial Brady v. United States, 397 U.S. 742, 753. 90 S.Ct. 1463, 1471, 25 L.Ed. 2d 747 (1970) Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas. Compare United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) with Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492 58 L.Ed.2d 466 (1978) (statute valid when plea of non rult gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as much as the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. Cf. Corbitt, 439 U.S. at 224 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).

In criminal cases generally, sentencing after conviction following a failed plea bargain presents a different situation from sentencing on retrial after a reversal of a prior conviction or sentence. Upon a second conviction after a prior conviction has been set aside, a defendant stands in the same posture for sentencing as he did after his first conviction. Presumably the facts before the court for determination of the correct sentence would be the same in both instances. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a penalty for the defendant's challenging of his conviction. See Wasman r. United States. -U.S. - 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

A defendant who pleads guilty, however, is in a markedly different posture from a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation.

Moreover, by pleading guilty a defendant confers a substantial benefit to the objectives of the criminal justice system:

the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of pun- death. The procedure in Florida fully

ishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain, from a defendant's point of view, is the option of avoiding a possibly harsher sentence after conviction

- [3] Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. Blackmon r. Wainwright, 608 F.2d 183 (5th Cir.1979), cert. denied, 449 U.S. 852, 101 S.Ct. 143, 66 L.Ed.2d 64 (1980). We have held that a mere allegation of discrepancy between a defendant's actual sentence and that which he would have received had he foregone trial to plead guilty does not invalidate the sentence. Smith v. Wainwright, 664 F.2d 1194 1197 (11th Cir.1981).
- [6] In capital cases particularly, there is no merit to the argument that the sentencing judge should have set forth the reasons why the sentence after trial was greater than what would have been approved on a guilty plea. The precise reasons for a death sentence are required by Florida statute to be set forth by the sentencing judge. The possibility of a different sentence because the defendant pleads guilty does not run afoul of the requirement that the "decision to impose the death sentence be, and appear to be, based on reason." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). In this case, the court imposed the death penalty only after fully considering the aggravating and mitigating circumstances and receiving the jury's recommendation of

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meets the Ninth Circuit's requirements U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 that if a court participates in plea bargaining "the record must show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." United States v. Stockwell, 472 F.2d 1186. 1187-88 (9th Cir.), cert. denied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

[7] A trial court which approved a sentence based on a plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, nor impose such sentence only for conduct occurring after the aborted plea bargaining.

The district court properly denied Hitchcock's petition for habeas corpus. AFFIRMED.

JOHNSON, Circuit Judge, dissenting, joined by CLARK, Circuit Judge, and

joined as to Part I by GODBOLD, Chief Judge, KRAVITCH and R. LANIER AN-DERSON, III. Circuit Judges:

The district court denied habeas corpus relief to James Ernest Hitchcock without conducting an evidentiary hearing. The failure to conduct such a hearing should determine the outcome in this case, for two 921.141(2), (3) (describing task of jury and of the allegations of error raised by the sentencing judge as balancing of aggravatpetitioner are legally sufficient to require a ing circumstances against mitigating cirgrant of relief and the only real question is cumstances "as enumerated" in statute) the truth of his factual allegations. We with FLA.STAT. 921.141(5), (6) (aggravatcannot at this point determine whether ing circumstances "shall be limited" to accordance with the Constitution, and should therefore remand the case for factfinding by the district court. Accordingly, 1 dissent

#### 1. Cooper/Lockett claim

The petitioner in this case contends that Florida law at the time of his sentencing hearing was most reasonably interpreted to restrict the presentation of mitigating evidence in violation of Lockett v. Ohio, 438

\* Furman v. Georgia. 408 U.S. 238, 92 S.Ct. 2726. 33 L.Ed 2d 346 (1972).

(1978), and that the interpretation of state law operated in his case to prevent him from presenting some mitigating evidence to the jury. The first half of this argument is virtually beyond dispute, while the second half can be properly evaluated only after an evidentiary hearing.

# A. State law at the time of Hitchcock's

As the majority concedes, a progression of events from the enactment of the post-Furman \* Florida death penalty statute in 1972 to the time of his sentencing trial in 1977 created the possibility that state law would restrict improperly the types of mitigating evidence that could be presented. Whether such restrictions actually affected any particular sentencing hearing during this time must be determined on the facts of each case, and Hitchcock's claim must be viewed in light of the fact that at the time of his sentencing trial in 1977 the confusion regarding state law was at its very height. Cf. Songer v. Wainwright, 769 F.2d 1488 (11th Cir.1985).

Defense counsel, prosecutor and trial judge were all interpreting the statute in light of erroncous or misleading language in the statute itself, compare FLA.STAT. Hitchcock was convicted and sentenced in eight categories, while mitigating circumstances "shall be" those contained in listed categories), and decisions of the Florida Supreme Court, including State v. Dizon. 283 So.2d 1. 7 (Fia.1973) (statute creates "a system whereby the possible aggravating and mitigating circumstances are defined"), and Cooper v. State, 336 So.2d 1133, 1139 (Fla.1976) (upholding trial court's decision to exclude evidence on relevance grounds because proffered evidence bore no relevance to issue involved at sentencing pro-

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sis supplied). See id. at 1139 n. 7. The relevant law at this time has been described in greater detail elsewhere, see Songer v. Wainwright. - U.S. - 105 S.Ct. 817, 819-22, 83 L.Ed.2d 809, 812-14 (1985) (Brennan, J., dissenting from denial of certiorari). Here it will suffice to note that the erroneous or confusing signals regarding mitigating evidence that were operating in this case were more plentiful

than at any time before or since.

The confusion affected cases tried during this time other than this one. In Songer v. State. 365 So.2d 696 (Fla.1978), cert. denied. 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), the court cited several cases in which it had affirmed sentences imposed after trial courts had allowed nonstatutory mitigating circumstances into evidence. While it is possible to question the accuracy of each of the seven citations since they arguably involved statutory rather than non-statutory mitigating circumstances. Hitchcock does not claim that all Florida courts followed an unconstitutional interpretation of state law. Rather, he claims that the improperly restrictive view was possible under state law and was followed in a number of cases, including his own. Several facts tend to support his contention. First, none of the seven cases explicitly state in holding or dicta that a trial court may consider mitigating evidence outside the statute. Second, during the time that defendants in some cases were perhaps proffering non-statutory evidence, the Florida Supreme Court appeared to reaffirm in other cases the restrictive interpretation of Cooper. For instance, in Gibson r. State, 351 So.2d 948, 951-52 (Fla. 1977), the court found no mitigating circumstances present at all and simply recit-

ceeding: sole issue in capital sentencing "is judge relied on Cooper and precluded evidence of non-statutory factors) The possibility of an unconstitutionally

restrictive application of the statute has

been recognized by almost every federal appellate decision mentioning the issue. Spaziano r. Florida. - U.S. - 104 S.Ct. 3154, 3158 n. 4, 82 L. Ed.2d 340 (1984) (Florida statute in effect in 1976 required consideration of only statutory mitigating factors); Songer v. Wainwright, 769 F.2d 1488 at 1489 (11th Cir.1985): Foster r. Strickland, 707 F.2d 1339, 1346 (11th Cir. 1983) (Cooper in direct conflict with Lockett ): Ford v. Strickland, 696 F.2d 804, 812 (11th Cir.), cert. denied. - U.S. -. 104 S.Ct. 201, 78 L.Ed.2d 176 (1983) (same): Proffitt v. Wainwright, 685 F.2d 1227, 1238 & nn. 18-19, 1248 (11th Cir. 1982), cert. denied, - U.S. -, 104 S.Ct. 508, 78 1. Ed 2d 697 (1983) (Florida law in flux reasonable to interpret as limiting mitigating evidence to statutory categories); but see Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979) (statute on its face does not improperly restrict use of mitigating circumstances). Thus, Hitchcock has successfully proven the first half of his argument, to wit. Florida law in February 1977 was highly susceptible to an interpretation that violated Lockett r. Ohio.

# B. Effect of Florida law in Hitchcock's

The petition for habeas corpus in this case forthrightly states that Hitchcock's trial counsel. Tabscott, believed that Florida law prohibited him from introducing mitigating evidence falling outside the confines of the statutory list. It also alleges that this understanding of state law directly caused him to pass over critical pieces of mitigating evidence.

The district court summarily dismissed the petition under Rule 4 of the Rules ed the lower court's findings concerning Governing Section 2254 Cases, without an the absence of statutory mitigation. See evidentiary hearing. Under Blackledge v. also Perry v. State. 395 So.2d 170, 174 Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 (Fla 1981) (in trial before Songer, trial L.Ed.2d 136 (1977), summary dismissal is

proper only under limited circumstances. The majority in this case has necessarily concluded, therefore, that proof of the claim does not depend upon facts outside the record or that the allegations in the petition are "palpably incredible" or "patently frivolous or false." Id. at 76, 97 S.Ct. at 1630.1 None of those conditions are present in this case.

The best factual support for the factual allegations in the petition appears in the affidavit of Tabscott stating that at the time of trial he believed that non-statutory mitigating factors were inadmissible. The majority correctly notes that this affidavit leaves many unanswered questions regarding Tabscott's understanding of state law at the time of sentencing and the effect that state law had on his conduct of the defense. No court has made findings of fact regarding Tabscutt's understanding of state law. The existing record does not reveal whether and how Tabscott acted on his alleged beliefs regarding the restrictions of state law and there has been no evidentiary hearing regarding this matter. although the Florida Supreme Court stated in Hitchcock's direct appeal that the trial judge had not erroneously limited the types of mitigating evidence presented to the jury because "the defense itself chose to limit that presentation." 413 So 2d at 745 The extent to which the affidavit falls short of proving the allegations of the petition and did not stress it in closing argument or only underscores the necessity for an evidentiary hearing.

The truth of Hitchcock's claim is also supported, but not established, by the existence of several pieces of evidence that could have been investigated and introduced at his trial if his attorney had not held a restrictive view of the statute. He

- 1. Riackledge also provides for summary dismissal when the petitioner has stated no claim upon which relief can be granted. The majority dues not hold that Hischcock's claim is insufficient as a matter of law
- 2. The majority makes reference to the statutors mitigating circumstance involving mental and emotional conditions. These do not permit the inference, however, that state law could not have limited the presentation of available evi-dence. First much of the available but unpic-

770 FEDERAL REPORTER, 24 SERIES describes extensive testimony that he could have elicited from family members and a law enforcement officer regarding the difficult circumstances of his childhood and his good prospects for rehabilitation. He also proferred before the district court the testimony of a psychologist who had examined Hitchcock. Her testimony related to the lingering possibility of Hitchcock's innocence (attacking the victim in a time of stress would have been an uncharacteristic response for Hitchcock) and to the possibility of rehabilitation 2

On the other hand, Hitchcock did present at the sentencing trial the testimony of his brother. The primary purpose of the testimony was to substantiate the existence of a statutory mitigating circumstance sulstantial impairment of his ability to appreciate the criminality of his actions. To the end, the brother testified that Hitchcock had "sucked gas" as a child and that as a result his mind "wandered". The brother also related to the jury in brief fashion itwo transcript pages) that Hitchcock had grown up on a farm, that his father had died of cancer, and that he had served as habysitter for several family members These facts were not statutory mitigated. evidence: yet Tabscott elicited the testinony only as background to the brother's testimony regarding the statutory factor, could enter into the jury's formal balancing process He stated that the jury should consider the background information "for whatever purposes you may doem appropriate." Tabscott also referred in passing to the evidence of Eitcheock's character presented earlier during the guilt-innocence

sented evidence had no connection with mental and emotional conditions. Second, the testimons of the psychologist would not fit under any of the statutors mitigating circumstances for they refer to an "extreme mental or emotional disturbance" and to substantial impairment of the capacity to approcease the criminality of one's conduct or to conform conduct requirements of law FLASTAT \$ 921

made the statement that the jury should consider "everything together," although it is far from clear whether he meant by this statement that the jury should consider all statutory and non-statutory mitigating eviwhatever way they saw fit the mitigating defense stands in marked contrast to the evidence that the law permitted them to

The preceding overview of the evidence consider. presented at sentencing confirms that some evidence not strictly related to statutory mitigating factors was placed before the jury. The question is whether this renders "pulpably incredible" or "patently false" Hitchcock's allegation that state law restricted the presentation of mitigating evidence. The only reasonable conclusion is that it does not.

The opinion in Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 373 (1978), states that the sentencer must be able to hear any mitigating evidence relating to the defendant's character or record or the circumstances of the offense. not just some evidence outside the bounds of a statutory catalogue. It should not matter whether the restriction of mitigating evidence is a complete failure to mention the evidence or the failure to develor it fully and in sporate it into the defense. The issue to be resolved in an evidentiary hearing would be causation rather than the type of restriction involved. Did state liw really cause counsel to restrict the presentation of mitigating evidence

A lawyer might believe that state law prohibits the use of non-statutory mitigating evidence and could still introduce some evidence of that type and make passing reference to it in the belief that it would not provoke an objection so long as the reference is brief and unimportant Similarly, a lawyer may feel free to mention evidence during closing argument that was adduced during the guilt innocence trial, in the belief that the restrictions of state law apply primarily to the introduction of evidence at sentencing and do not place such stringent limits on closing arguments

trial. At the close of his argument, he Each of these explanations is consistent pulpably incredible or patently false.

The majority's willingness to assume no eauxal link between Tabscott's interpretation of state law and his presentation of the wright, 769 F 2d 1488 at 1489 (11th Cir. 1985). In that case the court was confronted with evidence that a trial judge had believed that state law prohibited him from considering ron-statutory mitigating evidence as he reached a decision regarding the appropriate sentence. The en banc court granted habeas corpus relief despite the lack of conclusive evidence regarding a causal link between the judge's beliefs and the sentence imposed, for it was not clear just what mitigating evidence the trial court had refused to consider as a result of statutory interpretation Songer should demonstrate that once a petitioner establishes that a restrictive interpretation of state law could have limited the type of mitigating evidence presented to or considered by the sentencer, incomplete evidence of a causal link between the operation of state law and the mitigating evidence actually considered or presented will not defeat the Care. Hitchcock is entitled to an evidentiary hearing at least as clearly as Songer deserved habeas corpus relief

In sum, the truth of the factual allegations in the petition remains an open question that should be answered in an evidentiary hearing. Hence it is not proper to deny haheas corpus relief on this claim at this stage of the proceedings.

# Plea Negotiations

During a pretrial conference, the state court judge allegedly told Hitchcock's lawyer that he would impose a life sentence if the defendant pleaded nolo contendere, an offer that Hitchcock refused. No transcript of this conference was ever made but Hitchcock's attorney executed a contemporaneous aff-davit documenting the refused offer. Hucheoek claims that the death sell-

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for his decision to reject this plea offer by being punished for exercising the constituthe trial court. The death sentence, he tional right to appeal or to attack collateralargues, was an improper burden on his right to a jury trial.

In order to decide whether there is a to determine (1) whether, assuming Hitchcock's allegations are true, he has stated a claim upon which relief can be granted, (2) whether the state court's factual findings on this matter are sufficient and correct.

### A. Sufficiency of claim.

The majority assumes that the facts were just as Hitchcock alleged: the trial court and the prosecutor offered in conference before trial to accept from Hitchcock a plea of nolo contendere in exchange for a life sentence, an offer which Hitchcock refused. The same trial court imposed the death sentence on Hitchcock without stating on the record the reasons for increasing the punishment from life imprisonment are insufficient to state a basis for relief

Normally the initiation and breakdown of plea negotiations would not prevent the court from imposing a sentence heavier than the one originally offered. Under Bordenkircher v. Hayes, 434 U.S. 357, 98 S Ct. 663, 54 L Ed 2d 604 (1978), a prosecutor may in the give-and-take of piea bargaining make an offer and then later seek a more severe punishment. But this was no ordinary breakdown in bargaining, for two reasons. First, the court became involved in the negotiations; second, the sentence imposed was death.

similar to North Carolina v. Pearce, 395 atively appeared on the record. Any other

tence was imposed upon him as punishment result would imply that a defendant was ly a conviction.

The involvement of the trial court was important to the finding of a due process need for further factfinding, it is necessary violation in Pearce: "It is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." 395 U.S. at 724, 89 S.Ct. at 2080 (quoting Worcester v. Commissioner, 370 F.2d 713. 718 (1st Cir.1966). While Pearce did involve sentencing at retrial rather than a first trial, the right to stand trial in the first instance is no less fundamental than the right to appeal that was involved in Pearer, and the mechanism for burdening the defendant's right carries the same appearance of impropriety whenever the court brings its coercise power to bear in negotiations. Indeed, the Ninth Circuit has found the analogy between the two situations persuasive enough to construct a gen-The majority then holds that these facts eral constitutional rule against judicial involvement in plea negotiations. Once it appears on the record that the court has taken a hand in plea bargaining that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty." United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied. 411 U.S. 948, 93 S.Ct. 1924. 36 L.Ed.2d 409 (1973)

Such an application of Pearce might not be constitutionally mandated: it is certainly unnecessary here. Disclosure of reasons The fact that the court itself offered the for enhanced sentences in all cases of judilife sentence to Hitchcock makes this case cial involvement in plea negotiations might not be constitutionally required because, as U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 the majority points out, vindictiveness is (1969), which held that a state court could more likely to motivate harsher sentences not impose a greater sentence on a defend- after appeal and retrial than after rejection ant after retrial following a successful ap- of a plea bargain: in the latter case, the peal unless the reasons for doing so affirm- proof at trial is available to explain the enhanced sentence 3 Yet Hitchcock's case

prosecutor and a defendant, parties of roughly equal strength, whereas the participation of the court is more markedly cuercive to the defend

<sup>3.</sup> On the other hand, Supreme Court precedent certainly does not foreclose the Stockwell rule Bordenkircher involved negotiations between a

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sentence of death.

The majority's attempt to address the problem of judicial involvement in the plea bargaining process completely ignores the peculiarly coercive impact of a threatened death penalty. It is true, as the majority states, that prosecutors may participate in plea-bargaining, Bridy r. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed 2d 747 (1970), and legislators may within certain limits create statutes that reward defendants for foregoing trial. Corbitt r. New Jersey. 439 U.S. 212, 59 S.Ct. 492, 58 the death penalty in order to induce a plea L Ed 2d 466 (1978). Yet legislatures are of guilty, this case involves the confluence restricted in their use of the death penalty of two coercive factors that have been limto induce guilty pleas. For instance, in United States v. Jackson, 390 U.S. 570, 88 It would be most in keeping with the due S Ct. 1209, 20 L Ed 2d 138 (1968), the Court invalidated the procedures of the Federal Kidnapping Act under which a defendant ipation of courts in plea-bargaining in capawould receive a life sentence if he plead tal cases. Whether those restrictions took guilty but could receive a death sentence if the form of an absolute prohibition or a he chose trial. The Court stated that requirement that the reasons for the impowhere the assertion of the right to a jury sition of the death sentence despite the trial could cost a defendant his life, the statute "needlessly encourages" guilty pleas. And in Corbitt v. New Jersey, 439 U.S. 212, 217, 99 S.Ct. 492, 496, 58 L.Ed.2d 466 (1978), the Court approved a statute extending leniency in return for a guilty plea in non-capital cases, but noted that severity and irrevocability" was not in- court's involvement in an earlier plea negovolved. The same limits applicable to legislative use of the death penalty threat as an incentive to defendants should apply with equal force to judges

Moreover, the unusually coercive power of the threat of a death sentence is heightened further when the threat comes directly from the judge, who plays a entical and sometimes decisive role in the capital sentencing process. Judges are not limited in their power to punish a defendant for in-

ant. The due process clause should come into plus in cases possing the greatest risk of com-

sisting on the right to trial by weighing ing to all judicial involvement in plea nego- that fact in determining the sentence as prosecutors and legislators are. Prosecutors do not have the power themselves to determine sentence, and the legislature must pass general legislation without singling out particular defendants. The particularly sensitive and energive role of the judge in the defendant's decision to plead guilty has been often noted in the context of Fed.R.Crim.P. 11. See United States v. Adams, 634 F.2d 830 (5th Cir.1981). The majority's equation of legislators, prosecutors and judges does not account for the uniquely coercive power held by judges

Assuming, then, that the judge in this case did offer a reduced risk of receiving Jackson, and Corbitt to restrict the partic-Hitchcock would have stated a claim

# B. State court factfinding

Before the trial judge sentenced Hitchcock, his attorney made a statement to the court on his behalf. At one point during "the death penalty, which is unique in its the remarks, the attorney referred to the

MR TABSCOTT: I would also remind the Court that prior to trial, the Court did agree to a plea of noin contendere giving the defendant a life sentence upon that plea. I have nothing further. THE COURT. I think the record ought

to show that the matters we discursed. there was never any understanding, because your client didn't want to consider any plea

cion including those cases where judicial in

ever. And, it is true he declined to enter then rejected by the defendant. that plea.

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This is the entire factual record before this court relating to Hitchcock's claim. When this claim was pressed before the Florida Supreme Court, the record also contained an affidavit completed by Tabscott at the time of the plea offer, stating that "Judge Paul indicated that he would accept a plea of nolo contendere as charged and that the Appellant would be sentenced to life imprisonment." The prosecutor completed an affidavit three years after the sentencing that contradicted Tabscott's version: "Judge Paul indicated that he would consider (the State's) recommendation, should the ... defendant actually plead guilty as charged."

The Florida Supreme Court ultimately rejected Hitchcock's claim by making a fac- been developed tual finding. It stated that "the judge agreed only to consider such an agreement if Hitchcock were to plead guilty There is nothing in the record even hinting that the trial court imposed the death penaity because Hitchcock chose to have a jury trial." 413 So 2d at 746.

The warden now contends that this is a factual finding entitled to the presumption of correctness of 28 U.S.C.A. § 2254(d) Of course, the statement that "the judge agreed only to consider such an agreement if Hitchcock were to plead guilty" can only be construed as finding of historical fact, not a legal conclusion. But the Florida Supreme Court reached its findings by reviewing conflicting affidavits and ambiguous statements in the trial transcript. It did not remand for an evidentiary hearing despite the availability of the affiants. Moreover, the finding reached by the court relied exclusively on the affidavit completed years after the event and ignored the affidavit created at the time of the pleaoffer. The court also made a logical jump from the trial court's statement that "there was no understanding" to the conclusion that the trial court never had to "consider" the offer. The trial court's statement

MR. TABSCOTT: That plea was offered could also have meant that it considered an to him by the State and the Court, how- offer and extended the offer, which was

Under these circumstances, the Florida Supreme Court cannot be said to have reached its findings of fact after a full and fair hearing, 28 U.S.C.A. § 2254(d)(2), and the finding was not supported by the record as a whole, 28 U.S.C.A. § 2254(d)(8). Thus, the statutory presumption of correctness does not apply. The district court should be ordered to hold an evidentiary hearing to resolve the conflict in the exist ing record and determine whether the trial court attempted to induce Hitchcock to plead guilty by threatening him with an increased chance of receiving the death penalty if he went to trial I therefore dissent from the majority's holding that denies relief to Hitchcock before the facts relevant to his adequate legal claim have

HITCHCOCK v. WAINWRIGHT Circ at 777 F 2d 625 (11th Cir. 1965)

Court for the Middle District of Florida, John A. Reed, Jr., J., denied writ and prisoner appealed. The Court of Appeals, 745 F.2d 1332, affirmed. On rehearing en banc, the Court of Appeals again affirmed. 770 F.2d 1514. On petition for rehearing en banc, the Court of Appeals held that standards for granting rehearing under Rule 40 are applied when rehearing of an en bane court is sought and senior judge who sat on the en banc court on the decision of the case may participate in the consideration of the petition.

Petition denied

Johnson, Circuit Judge, dissented and filed an opinion in which Kravitch, J., inined

### Federal Courts €744

When an en bane court has decided a case, petition for rehearing of that decision will be treated as a petition under Rule 40 for rehearing, addressed to all judges who sat on the en bane court, standards for granting rehearing under Rule 40 will be applied to consideration of the petition. which need not meet the standards required for the granting of rehearing en banc under Rule 35, and a senior judge who sat with the en banc court on the decision of the case shall participate in the consideration of the petition for rehearing. 28 U.S. C.A. § 46(c); F.R.A.P. Rule 40, 28 U.S.C.A.

James Ernest HITCHCOCK. Petitioner-Appellant.

Louis L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 83-3578.

United States Court of Appeals. Eleventh Circuit Nov. 19, 1985

Death row inmate sought federal habeas corpus. The United States District. NEY, TJOFLAT, HILL, FAY, VANCE,

Richard B. Greene, Richard H. Burr. Craig Barnard, West Palm Beach, Fla., for petitioner-appellant

Richard Prospect, Asst. Atty. Gen., Daytona Beach. Fla., for respondent-appellie

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RO-

ANDERSON and CLARK, Circuit Judges, also participate in the consideration of the and MORGAN, Senior Circuit Judge.

This case was heard en bane. Hitchcock 1. Wainwright, 770 F.2d 1514 (11th Cir.

A petition for rehearing has been filed seeking rehearing of that decision. When the en bane court has decided a case, and rehearing of that decision is sought, the petition will be treated as a F.R.A.P. Rule 40 Petition for Rehearing, addressed to all judges who sat on the en bane court. The standards for granting rehearing under Rule 40 will be applied in consideration of the petition.

Once the case is taken en banc, the petition for rehearing need not meet the standards required for the granting of rehearme en bane under F.R.A.P. Rule 35. A senier judge who sat with the en bane court on the division of the case, pursuant to 28 U.S.C.A. § 46(c), shall participate in the consideration of such petition

The petition for rehearing in this case is

GODEOLD, Chief Judge, RONEY, TJO-FLAT. HILL, FAY, VANCE, HENDER-SON, ANDERSON and CLARK, Circuit Judges and MORGAN, Senior Circuit later coreer in this opinion.

JOHNSON, Circuit Judge, dissenting, in which KRAVITCH, Circuit Judge joins.

rehearing will be treated as a FRAP. Rule 40 Petation for Rehearing. In conscrehearing en bane under F.R.A.P. Rule 35, ited to judges in regular active service administration" that requires the "intimate This action allows a senior circuit judge, and current working knowledge" of the

KRAVITCH, JOHNSON, HENDERSON, who participated in the en bane decision, to

F.R.A.P. Rule 40, which specifies the procedures to be followed in petitioning for rehearing, says that the petition "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehend-" The focus of the petition for rehearing is thus to enable the court to correct its mistakes. The petition is addressed to the three-judge panel which has decided the case. This Circuit does not limit consideration of such petitions to judges in regular active service.

In contrast, F.R.A.P. Rule 35 states that rehearings of the court of appeals en banc are "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Participation in the decision of whether to rehear a case en bane is limited to those "circuit judges who are in regular active service." F.R.A.P.

The Supreme Court has held that, although a senior circuit judge who participated in the original panel that decided a case can participate in the en banc rehear ing of that case, no senior circuit judge can participate in any decision of whether or not to grant an en bane rehearing of a case. Moody r. Albemarle Paper Co., 417 U.S. 622, 94 S.Ct. 2513, 41 L.Ed.2d 358 (1974). The basis of the Court's decision have of the decision of the en bane court. was that Congress has explicitly vested the The majority holds that this petition for power to decide whether to rehear a case who are in regular active service." Id. at 627, 94 S.Ct. at 2516. The Court held that the standards required for the granting of Congress appeared to have contemplated "is essentially a policy decision of judicial

elected to participate in this decision, pursuont In 28 U.S.C.A. \$ 40(C).

<sup>\*</sup>Circuit Judge Joseph W. Haichett, having resoul Senior Circuit Judge Lewis R. Morgan

circuit possessed by judges in regular active service. Id. at 626-27, 94 S.Ct. at 2516.

The rationale for enabling senior circuit judges to participate in the decision of whether to grant a rehearing en banc in a case just decided by the en banc court is that such a rehearing would be simply to correct mistakes; the policy decision to rehear the case en banc would already have peen made. Whether or not this rationale is sound, it conflicts with Congress' express prohibition on senior circuit judges participating in the decision to rehear a case en banc. Id at 626-27, 94 S.Ct. at 2516-17, F.R.A.P. Rule 35. By its plain language, this prohibition covers the decision of whether to hear "an appeal or other proceeding" before the en banc court FRAP Rule 35. Since an en bane decision falls within the meaning of "an appeal or other proceeding," the decision of whether to rehear an en bane decision before the en bane court has been expressly limited to judges in regular active service.

I respectfully dissent.

James Ernest HITCHCOCK.
Petitioner-Appellant.

Louie L. WAINWRIGHT, Respondent-Appellee.

No. 83-3578.

United States Court of Appeals, Eleventh Circuit.

Oct. 18, 1984.

Opinion on Granting Rehearing En-Banc Jan. 8, 1985.

Florida death row inmate sought federal habeas relief. The United States District Court for the Middle District of Florida. John A Reed, Jr., J., denied writ, and petitioner appealed. The Court of Appeals. Roney, Circuit Judge, held that: (1) there was no constitutional infirmity in death penalty hearing as regards restriction on evidence of mitigating circumstances, (2) although life sentence was offered for repected guilty plea, there was no constitutional violation in imposition of death sentence after conviction following trial, (3) evidence was sufficient to prove that petotioner committed sexual battery by force. (4) legislature's recataloguing of rape as sexual battery did not make statutory aggravating factor referred to as "rape" so vague as to be susceptible of arbitrary application, and (5) although former practice of charging on all lesser degrees of an offense regardless of supporting evidence may have introduced some distortion into Affirmed.

Johnson, Circuit Judge, filed dissenting

#### 1. Criminal Law \$986.1

Florida prisoner, sentenced to death, failed to show any constitutional violation in nature of limitation on mitigating evidence at capital penalty hearing as therewas no showing that counsel would have done anything different had there been no confusion as to law on mitigating circumstances, and elements of petitioner's character and other background information were testified to by petitioner as well as his relatives, and trial counsel reminded jury of those facts during closing in the penalty phase. West's F.S.A. 6 921 141: U.S.C.A. Const Amends 8, 14.

## 2. Criminal Law (>986,2(6)

Rules governing imposition of greater punishment on retrial and resentencing after successful appeal do not apply to failure of a plea bargain and a greater sentence following trial. U.S.C.A. Const. 8. Criminal Law ⇔1206.1(2), 1208.1(5) Amends 5, 14

### 3. Criminal Law \$273.1(2), 986.2(6)

Legislative schemes which extend the possibility of lemency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to on ree maccurate guilty pleas

# 1. Criminal Law (>946:3), 986.2(6)

A trial court which approves a sentence based on a plea bargain prior to trial need not, on rejection of that offer and conviction at trial, restrict its sentence to FSA se 794 011, 921 141 that offered for the plea bargain, set forth reasons for harsher sentence, or impose 9. Habeus Corpus (\$\infty\$30(1) such sentence only for conduct occurring after the aborted plea bargain, notwith-U.S.C.A. Const. Amends 5, 14

Test for sufficiency of the evidence on habeas corpus is whether viewing the evi dence in the light most favorable to the government no rational trier of fact could have found proof of guilt beyond a reasonable doubt. U.S.C.A. Const. Amends 5, 14.

#### 6. Homicide \$354

A defendant cannot be sentenced to death for participating in a felony with no intent to participate in a murder, but where defendant himself participates in both the felony and the intentional killing, that principle does not apply

#### 7. Homicide @230

### Rape C=32(3)

Evidence, including medical examination revealing that lityear-old child was previously of chaste character, was sufficient to prove that petitioner committed sexual battery by force and was sufficient to show that homicide, i.e., strangulation following sex act, occurred intentionally, not accidentally in course of an unrelated

Florida legislature's recataloguing of rape as sexual battery in the statute bank. did not make the death penalty statutor; aggravating factor referred to as "rape" so vague as to be susceptible of arbitrary or capricious application, and where instructions at guilt phase described the felony of sexual batters, which is equivalent to trade tional crime of rape, and in penalty phase charge the court again used the term " sex ual battery" instead of "rape," the statut i ry aggravating factor mentioning rape was not applied in an arbitrary manner. West's

Fiorida prisoner waived any right to complain about instructions as to lesser standing that plea bargain is for life in degree offenses, specifically, that at time prison whereas death penalty is imposed of trial Florida required instructions on all after trial, provided there is no showing of lesser degrees of charged offenses even judicial vindictiveness or punitive action, when there was no evidence to support such offenses, because the instructions giv745 FEDERAL REPORTER, 26 SERIES

a ware the case to requested and petition. gating factors, (2) whether the trial court considered petitioner's refusal to pleaf the death sentence to provide the consumer of personners remain to provide the sentence to vase by his failure to object at trial or on whether the cycle use was sufficient to succ en 1 41 (m s)

10 Criminal Law 0-1213.3 A though, under Florida's system, as used at time of death penalty inmate's trial of the defense requested, the court had to haw which required the jury be instructed matruct on all lesser degrees of the charged offense regardless of supporting evidence, and although then existing practhe may have introduced some distortion ty allowing for jury pardon, no Eighth Amendment problem was created West's FSA RCrP Rule 3.490, U.S.C.A. Const. Amends, 8, 14.

. Richard B. Greene, Richard H. Burr. Public Defender of Florida, Craig Barnard, West Palm Beach, Fla., for petitioner appel-

Richard Prospect, Asst. Atty. Gen., Daytona Beach, Fla., for respondent appellee.

Appeal from the United States District tour for the Middle District of Florida

Before RONEY and JOHNSON Circuit

# ENNEY Circuit Judge

tion of the brother's thirteen-year-old step course and reacted by strangling the girl. laughter. After a direct appeal and postconviction proceedings in the Fiorida state courts, Hitchcock petition in federal distrue court for a writ of hubeas corpus. The district court denied the writ without an evidentiary hearing. We affirm

Petitioner Hitchcock raises numerous issure on this appeal (1) whether Florida law discouraged his attorney from investiguting and presenting nonstatutory miti-

1. Petitioner's consistion and sentence were alferned by the Floretta Supreme Court in Hatel. 440 LS 960 101 SC1 274 74 L1d 2d 21s

port his consistion, (4) whether the death penalt, in Florida has been imposed in arbi trary and capricious manuer either because of tat a defect in Florida's death, penalty statute, Fla.Stat.Ann. & 921 141, tto Florada whether or not there was evidence to support a conviction on the lesser degrees, or (c) racial discrimination, and (5) whether the Brown issue as decided in Ford a Strickland, 696 F 2d 804 (11th Cir) ten banci, cert. denied. - U.S. -, 104 S.C.

201, 78 L.Ed 2d 176 (1985), should be recon-

sidered. We will address each issue in that

The facts of the case can be briefly summarized Thirteen-year-old Cynthia Driggers was murdered by strangulation on July 31, 1976. Her body was recovered later that same day. An autopsy revealed that Driggers' hymen had been recently lacerated and that sperm was present in her vagina. Her face had cuts and bruises to the vicinity of the eyes. On August 4. 1976, petitioner confessed to the murder He claimed that he and the victim has Proces and MORGAN. Senser Circuit consensual sexual relations and he killed threatened to tell her parents. At trad petuater changed his story. He testifud has brother Richard, the garl's steplatter and sentenced to death for the strangular discovered Cynthia and him having inter-

# Restriction of Mitigating Evidence

Petitioner argues the district court should have held an evidentiary hearing on the question of whether he was denied a fair and individualized capital sentencing determination by the preclusion of nonstalutory mitigating factors as a result of el ther the operation of state law or the denial of effective assistance of counsel because

(1982). Petitioner's motion to valids judgment and softeness was denied in value judgment and the Thomas Supreme Court afterned His heart v State 432 Sec2 d 42 (Lia Just)

this case, we conclude no constitutional informits exists in regard to petitioner's sen-

teneng hearing

Florida recenacied its death penalty statute following Farman t. Georgia. Ins U.S. 238, 92 8 Ct. 2726, 33 L Ed 2d 346 (1972). which is effect belt all extant capital penal ty statutes to be unconstitutional. The new statute contained a list of factors desomed to grade discretion in the auposition of the death sentence. Buth agernvating and natigating factors were listed. The statute explicitly limited those circumstance es that could be considered as aggravating No such restrictive language, however, was used in conjunction with the mitigating c.reun.stances See Fla.Stat. e 921.141 (1972). This feature was noted by the Supremy Court in its opinion holding the statute to be constitutional Proffitt . Flori-61: 425 U.S. 242, 250 n. 8, 96 S.Ct. 2960. 26.5 L. S. 49 L.Ed 2d 913 (1976) C There is ne such limiting language introducing the list of statutory natigating factors ')

The inquestance of a lack of restriction on the sentencer's consideration of mitigating circumstances in fixing the penalty for a capital crime was confirmed by the Supreno Court in Lockett v. Ohio. 438 U.S. 56. 605, 98 S.Ct. 2974, 2005, 57 L.Ed.2d St. COTS) The Court heid unconstitutions al an Onio statute which limited mitigating evilence to a narrow sit of factors. As to the distinction between the Ohio and the Florala statute the Court made the follow-

Although the Florida statute approved in H.C. othervation. Proffit contained a list of mitigating factors, s.A members of the Court assumed, in approving the statute, that the and the companion cases clearly operated the learning death penalty statute docat that time to prevent the sentencer not restrict the mitigating evidence to the

from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

Two years prior to Lockett and six days

after the decision in Proffitt, the Florida Supreme Court in Cooper v. State, 336, So.2d 1125 (Fla 1976), cert, demed, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), used language which some contend should be interpreted as limiting the introduction of mangating circumstances to those enumerated in the statute. The court upheld a trial court's refusal to admit testimony regarding a capital defendants employment history as a mitigating circunstance. The defendant argued that his ear playment history demonstrated he was too beyond relabilitation. Neither employment history nor potential for rehabilitation are statutory mitigating factors. See Fla-Stat Ann. \$ 921.14160. The court rejected the defendant's argument, reasoning that employment history was not particularly probative of a person's ability to conform

to the law and that [i]n any event, the Legislature chose to list the natigating circumstance, which it judged to be reliable for determining the appropriateness of a death penalty and we are not free to expand that list 336 So 2d at 1139. In a footbate, the court emphasical the restrictive design of the Florida statute as regards to both ageravating and mitigating factors, stressing that the statute only would linut the arbtrariness consierand in Furman if discretion was hinted "whether operating for or against the death penalty." 136 Se 20 at 1139 n. 7 See Percy v. State, 305 Se 23 170, 174 (Fla 19-0) (trial judge interpreted Cooper as barring non-statutory matigating

Two years later and shortly after the explenent decoude in Lockett, the Floreia Supreme statute was not exclusive. None of Court in Songer v. State, 365 So.24 cm. the statutes we sustained in Grego [428] (Fla 1978), cert, denied, 411 U.S. 956, 93 U.S. 153, 86 S.Ct. 2509, 49 L.Ed.2d 859] S.Ct. 2185, on L.Ed.2d 1060 (1979), clearly

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Court was concerned and with whether enumerated factors whether its explaine others was proba-tive. Chef Justice Barger, writing for the statutery mitigating categories. were twing record in mitigate in logs with whether the explane offered was probathe majority in Locki !!, expressly stated that irrelevant evidence may be excluded from the sentencing process 98 S.Ct. at me5 n. 12 Cooper is not apropos to the problems addressed in Lockett.

As concerns the exclusivity of the list of nutigating factors in Section 921 141. the wording itself, and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive. This was not ed, in fact, in Proffitt 1, Florida, 425 US 242 96 S.Ct. 2000, 49 L.Ed.2d 913

list n Washington v State, 362 So 2d S. 2d 111 (Fla.1978). McCaskill v. State. 341 So 2d 1276 (Fla 1977). Chambers 1. State, 330 So 2d 204 (Fla 1976), Mecks ; State, 256 Sec2d 1142 (Fla 1976); Messer

British I State, 323 S. 2d 357 (Fig. 19.50 among others. Obviously, our factors listed in the statute merely indicate the principal factors to be con-

36.5 So 2d at 700 (footnote omitted). Prior to that decision, this Court had addressed the issue of whether Florida's per emlated Lockett. In Spinkellink 1, the penalty phase of his trial restricted the Walnunght, 578 F.2d 582 (5th Cir.1978), jury from considering nonstatutory mitideath penalty statute as interpreted in Coo-Wathheright, 578 F.2d 582 (5th Cir.1578). Jury from considering nonstatutory mit-cert denied, 440 U.S. 976, 99 S.Ct. 1548, 59 gating circumstances. Ford did not object LEd 2d 796 (1979), we reviewed Proffitt to the instructions at trial or on direct

course rated in the statute. In de- and Lockett and stated of the conclusion is and Locket and stated (If a conclusion is a control for rehearing which argued in evitable that the [Subreme] Court continues the control of The last dear the reported by ass to view Section 9.1.111 as constituted the previous statute as its expected by the to view Section 9.1 (1) as constitution of the property of the foundation of the control of the c Spinkellink was trud in 1973, prior to Conper. Spinkellink presented and argued to the jury circumstanes and fitting within

Petitioner here was tried in January. 1977, which was after the Florida court's decision ir. Cooper but before the United States Supreme Court's decision in Lockett. Thus, petitioner argues that his counsel, misled by Cooper and without the clarification of Lockett and Songer, believed that he was limited to presenting evidence in mitigation that fit within one of the statutorily enumerated listings. In one context or another, this basic legal problem has been argued to this Court several times since Spinkellink but in no case has relief been granted because of Cooper

In Proffitt v. Wainwright, 685 F 2d 1227 (11th Cir 1982), cert. denied. - U.S. we have approved a true court's con-independent of circumstances in mitigation 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), it was ineffective because he failed to present exi-183. In mashington v. State. 365. Ineffective recause he raises to present expenses the 1978; Buckeyn v. State. 375. dence of nonstatutory mitigating circumtrial in March, 1974 The Court indicated that at the time of Proffit's trail which was prior to Cooper, it was reasonable to State 330 So.2d 137 (Fla 1976); and assume that evidence of nonstatutory man-655 F 2d at 1248. In that case, however, the attorney testified that he believed that he could fit any mitigating evidence within the considered in mitigation, and that the 685 F.2d at 1238-39.

In Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, - US -, 104 S Ct. 201, 78 L Ed 2d 176 (1983), it was argued that the jury instructions at the penalty phase of his trial restricted the Ford had not been limited in the admission of mitigating evidence and thus could show no projudice. 696 F.2d at 813.

A similar issue was involved in Foster v. Strickland, 707 F 2d 1339, 1346-47 (11th Cir 1986, and the Court again held that no prejudice was shown because the petitioner did not suggest any supported nonstatutory mitigating evidence in the habeas corpus proceeding

[1] In the instant case, the district court dismissed this claim on the grounds that Florida law did not limit what evidence could be produced in mangation at the penalty stage and that the record indicated petitioner's attorney did not think he was constrained by the statute. Based on our prior precalents, the district court properly denied relief and an evidentiary hearing. The evidence proffered to the district court does not establish the right to constitutional relact. The record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

Petitioner submitted an affidavit of the atterney, a public defender, who represent-. I bin at trial and sentencing. The affida at of the attorney is carefully written. It states that although the attorney does not have an independent recollection, he is of the oproon upon reviewing the transcript, that during his representation of petitioner his perception was that consideration of magating circumstances was limited to the factors enumerated by the statute. It says he is aware of the current status of the case and that evidence of relevant mitigating circumstances was not investigated or presented in petitioner's sentencing trial. The affidavit does not indicate, however, that he would have done anything differently at that time. In Proffitt, this Court denied raisef on a record where the defendant's attorney testified unequivocally that at the time of trial he understood the Floridence that could be introduced to that falls troduced which would have corroborated

appeal. The Court denied relief because ing within the statutory mitigating circumstances. Although the attorney testified he believed he could fit any mitigating evidence within that scope, this Court stated that

the defense attorney's belief that he could not, under the Florida statute introduce evidence of mitigating factors not listed in Fla Stat. \$ 921.141(6) waentirely reasonable. His decision not to call witnesses at the penalty stage to sestify about appellant's general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance.

Proffitt, 685 F 2d at 1248.

At the sentencing hearing, petitioner, attorney colled petitioner's brother, James who testified about petitioner at the age of five or six, about his father's death, about the farn work of both the mother and the father beeing and picking cotton in Arkansas, that there were seven children in the family and that he left "Ernic" to babysit with the brother's small children other testimony relating to petitioner's character had come out at trial. Petitioner testifical he left house when he was thirteen because he could not tolerate seeing his stepfather abuse his mother. His mother testified that he was a good child and he matchel her. Three of his siblings told the pary he was not a violent person. During closin. argument the attorney referred to much of the evidence not fitting squarely within the confines of the statutory mangating circuit stances including the difficult circumstanes of petitioner's upbringing, the possibility of rehabilitation, and that petitioner volume tarily turned himself in. Finally, he ad monished the jury to "look at the overall picture. You are to consider everything together .. consuler the whole picture. the whole ball of way."

Petitioner has suggested several different pieces of evidence of nonstatutory mitgating circumstances which might have been presented. First, he argues that test mony by psychologists could have been in-

Ingering doubts about guilt and shown pe- ishment for petitioner's decision to go to therer was an excellent candidate for re-trial rather than plead guilty. Petitioner habitation. Such testimony would tend to alleged that the prosecutor and the judge establish his intocence he says, by bringmy . It that he had coped with stressful a hadren's throughout his life by retreating sentence. Petitioner declined the offer or examined. There is no indication in this resert, however that the attorney at the true of sentencing would have followed the course even if he had known he could with natters are not judged from haid Southenar Bashington, - 1 8 - -- 104 S Ct 2002, 2005, so 1, Ed 2d 174 694 (1984). It should be noted that ne ata, and enotional conditions are statuto permitted materiating considerations. Pa Sat Ann & 1021 141(4al) Petitioner ters eited us no cases holding that the mereis like to investigate or produce psychologital or psychiatric evidence renders a sento noing proceeding unconstitutional.

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Points her argues that greater details as the his upbringing in an environment of Alfreda poverty his solid character traits. bredter to hard work williamps to con-"re to be the family's support, and respect for allate should have been presented as and the permits phase

I & Sentence Official for Galt. Par-Heatt Sentence Improved Acres Cours within

Petitimer asserts that the state trial is tgo imposed the death senience as pur-

2 MR TABSCOTT [defense coursed] I would also to me the Concret that person to trust the Center! and argue to a plea of male contendere green, mand a life sentence on that plea-

time or those further the state of the state of their was new.

together offered him a plea bargain which would exchange his plea of guilty for a life After trial, the judge on the jury's recom mendation sentenced petitioner to death Petitioner argues his death sentence must he overturned because the trial judge's set-

tenents order did not explain why death became an appropriate penalty after trial The record is unclear as to whether the trial judge indicated he would approve a life sentence on guilty plea, or morely would consider it? We treat the case as if the defendant would have received a life sentence on a guilty plea-

12.31 Although the principle petitioner argues would apply on a retrial and a resentencing after a successful appeal. North Caroline v. Penree, 395 U.S. 711, 726, 89 S Ct. 2072, 2081, 23 L Ed 24 656 (1967) Blackledge v. Peery, 417 U.S. 21, 2-29, 94 S Ct. 2008, 2102-2103, 40 1, Ed 2d 62s with the of non-taintier, rangeling fac- (1974), it does not apply to the facure of a plea bargain Bordinkircher i Hope. 13 and extent for the cary. As described 434 US 355, 364, 98 S Ct. 163, 668, 51 above entiretts of patrioner's character | L.Ed.2d 604 (1978) In the "gar-and-take and other background information were of plea bargaining the state ran extend of six to petitioner's trather sister. Jenietary to a detendant who plants guiltat eacher as well as he permaner have foregoing his right to mry treat Bonda of I takents The coursel remaided I would State 397 LS 742 752 to S.C. the vir. I there had sharing close 2 argue 1465, 1471, 25 L Ed 2d 747 (1970). Legisla the schemes which extend the possibility If the appears had perforced was not and personer to defend acts who plead guilt atterned and a unified sentence ; here are permissible so long as the statute door not unnecessarily burden the assertion of constitutional rights or act to correct macet. rate guilty pleas Computer United States . Jackson, 390 U.S. 550, 88 S.C. 1209, 20 L.Ed.2d 138 (1968) (statute invalid where defendant could only receive death seletence if he went to trial with Carbitt i

any understanding because come da at dalut

MR Trascort that plea was offered to have by the State and the Court homeses s true he declined to enter that plea-

MR THIS TILL So on

judge, as with the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an ad-Bussim of cuit. Cf. Corbitt, 429 U.S. at 231 n. 14, 99 S.Ct at 500 n. 14 teannot termit presecutor to offer lemency but not

is ristalure).

Sentencing after conviction following a faired plea bargain presents a different sitnation from sentencing after a prior sentence and retrial. Upon a second conviction, a defendant stands in the same posture for sentencing that he did after his first conviction. Presumably all facts have been before the court for determination of 101 S.Ct. 145, 66 L.Ed.2d 64 (1986). We the correct sentence. Unless the court, have held that a mere allegation of discrete var - circumstances, which occurred after ancy between a defendant's actual sentenhis original sentence, a greater sentence, and that which he would have received him would appear to be for no reason other. he foregone trial to plead guilty does not than a penalty for the defendant's challeng- invalidate the sentrace. Smith . Maining of his conviction. See Wasman r. United States - US - 101 SC 3217 82 L Ed 2d 424 (1984) A defendant who pleads guilty, however, is in a markedis different posture than a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned ail of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation. Moreover, by t-leading guilty a defendant confers a "substantial benefit to the state."

after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial. tain its burden of proof.

S.C. at 1471. The state is entitled to expired guilty." United States r. Stockwell tend a sentence of less than that which 472 Fiel 1186, 1187-88 (9th Cir.) cord, do

New Jersey, 4:9 U.S. 212, 99 S.Ct. 492, 58 might otherwise be appropriate to a de-L.Ed.2d 466 (1978) (statute valid when plea fendant that confers such a benefit on it. of non rult gave possibility of sentence of 397 U.S. at 753, 90 S.Ct. at 1471. The not more than 30 years but conviction at heart of a plea bargain from a defendant's point of view is the option of avoiding a possibly harsher sentence upon conviction

> There is no ment to the argument that the sentencing judge should have set forth the reasons why the sentence after trial was greater than what would have been approved on a guilty plea. Absent a denonstration by the defendant of indicial you dictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial Blackmon r. Wainweight, 60s F 20 180 60h Cir. 1979), evel decold, 449 US 852 weight, 664 F.2d 1194, 1197 (11th Cir 1981)

That the death penalty is arrowed in the case does not alter the principle of law Given the different situations presented by a defendant who pleads guilty and a defendant convicted after trial, the possibility of different sentences depending on wheth er or not the defendant pleads guilty docnot run afoul of the requirement that the "decision to impose the death sentence be, and appear to be, based on reason. Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). In the more promptly imposed punishment—this case, the court imposed the death peralty only after fully considering the aggravating and mitigating circumstances and receiving the jury's recommendation of scarce judicial and prosecutorial re- death. The procedure in Florida fully sources are conserved for those cases in meets the Ninth Circuit's requirements which there is a substantial issue of the that if a court participates in plea bargaindefendant's guilt or in which there is ing "the record must show that the court substantial doubt that the State can sus-sentenced the defendant solely upon the facts of his case and his personal history, Brady v. United States, 397 U.S. at 752, 90 and not as punishment for his refusal to 1340

L Ed 2d 409 (1973)

441 A trail court which approved a sentence based on a plea bargain prior to trial need not, upon reaction of that offer and contiction at trial restrict its sentence to that offered for the plea bargain, set forth grasous for harsher sentence, nor impose such sentence only for conduct occurring after the aborted plea largaining.

#### Sufficiency of the Existence

In petitioner's guilt-innocence trial the mer was instructed that it could find petitioner guilty of first degree murder upon alternative theories: premeditated marder or felony murder. The jury returned a general vertict of guilty of first degree

15.61 Petitioner argues that the prosecution failed to prove felony-murder because the facts did not show that the felony of sexual la very had occurred but that the evidence supported his claim that the victim consented to sexual relations. He contends that since it cannot be determined in, which theory the jury based its verdict. the conviction must be reversed. The issue turns on whether there was sufficient evidence to support the felony murder theory without running afoul of Enmund v. Florido 478 U.S. 782, 102 S Ct. 3368, 73 L.Ed.2d

"[A] general verdict must be set aside if the jury was instructed that it could rely on and of two or more independent grounds, and one of those grounds is insuffi-" Zant v. Stephens, 462 US 862. - 105 S ( : 2783, 2745, 77 L Ed.2d 245, 252 (1985). Stromberg v. California, 283 One of the aggravating factors in Florida. U.S. 350, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). dais: post-Furnmen death penalty statute. The test for sufficiency of the evidence on was "fillie capital felony was committed habers corpus is whether viewing the evi- while defendant was engaged ... in the dence in the light most favorable to the commission of ... rape Government "no rational trier of fact could \$ 921.141 (1972). In 1974, the Florida leg have found proof of guilt beyond a reason- islature rewrote the rape statute. 1974 atile doubt." Jackson v. Virginio, 423 Fla.Laws ch. 74-121 \$ 1. The legislature U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 created the new crime of sexual battery L.Ed.2d 560 (1979). Coshy v. Jones, 682 which was breader than the repealed statu-F 2d 1373, 1379 (11th Cir.1982) A defendentory crime of rape. See Fia Stat Anni

and 411 US 948, 93 SCt 1924, 36 ant cannot be sentenced to death for partic ipating in a felony with no intent to particepate in a murder. Enwand, 45s P'S at 801, 102 S Ct. at 3378. Where the defend ant hinself participates in both the felony and the intentional killing that principle does not apply. Adams r Waina right, 700 F.2d 1443, 1447 (11th Cir.1983), cret. denied. - US -, 194 S.Ct. 745, 79 L.Ed 2d 203 (1984)

17) The evidence at trai showed that petitioner was temporarily staying at his brother's house. On the night in question. he returned to the house at a late hour and entered through a window. Petitioner admitted having sexual relations with his brother's thirteen-year-old stepdaughter. The young girl complained be had hurt her and that she was going to tell her parents. A medical examination revealed the girl was previously of chaste character. This evidence was sufficient to prove that petitioner committed sexual battery by force. The evidence was sufficient to show that the homicide occurred intentionally, not accidentally in the course of an unrelated

Arbitrariness of Death Penalty in Florida

[8] Petitioner raises three different arguments in support of the contention that the imposition of the death penalty in Florida violates the Eighth and Fourteenth Amendments. First, petitioner asserts that at the time of his trial the commission of rape in conjunction with the capital felony was listed as a statutory aggravating factor although the Fiornia legislature had replaced the come of rape with the crime of sexual battery

its standard jury instructions. Florida Standard Jury Instructions in Criminal Cases at 77-82 (1976). The death penalty statute has now been amended to include the term sexual battery. 1983 Fla.Laws ch. 63-216 9 177.

There is no merit to petitioner's contention that at the time of petitioner's trial the law had become so unclear that it was likely to be applied in an arbitrary and capricious manner. The jury instructions at petitioner's guilt-innocence trial described the felony of sexual battery which is equivalent to the traditional crime of rape. In charging the jury during the penalty phase, the court again used the term sexual battery instead of rape. The statutory aggravating factor mentioning rape thus was not applied in an arbitrary manner in petitioner's case. Contrary to petitioner's did not make the statutory aggravating factor referred to as rape so vague as to be susceptible of arbitrary or capricious application. See Hitchcock v. State, 413 So.23 741, 747-45 (Fla.), cert. denied, 459 U.S. 960 103 S.Ct. 274, 74 1. Ed 2d 213 (1982)

[9] Second, petitioner argues that at the time of this trial Florida, required instrucnotes on all lesser degrees of the charged offense even when there was no evidence to support these lesser offenses, thus rendering the system arbitrary and capricious Pentioner waived any right to complain about the instructions as to lesser degree offenses in this case because the instructions given are the ones he requested. He on instructing on lesser degrees in other 403 So.2d 979 (Fla.19-1). The rule now waived any right to object to Florida's law

3. The judge charged the jury that. It is a crime to commit sexual battery upon a person over the age of 11 years, without that person's consent, and in the process use or threaten to use a deadly weapon, or use actual physical force likely to cause serious physical

Sexual hatters means neal, and, or sayingle penetration by, or union with, the sexual of

a 794.011. In 1976, the Florida Supreme cases by his failure to object at tend or on-Court dropped all reference to rape as an direct appeal. Ford v. Strickland, 6:8: aggravating factor when it repromulgated F.2d at \$16-17. No "cause" for this failure major cases which forms the basis of petitioner's argument, Roberts v. Louisiana. 428 U.S. 325, 334-35, 9c S.Ct. 3001, 3006-07. 49 L.Ed.2d 974 (1976), was decided the year before his trial. See Reed v. Ross. -U.S. -, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984)

1341

[10] In any event, the argument that Florida's system is unconstitutional because in some cases lesser degrees of the charged crime are instructed without factual support is without merit. At the time this case was tried, there was a difference in the treatment of lesser degrees of a charged crime and lesser included offense Florida law has always prohibited instructions on lesser-included offenses unless the lesser-included offense is necessarily included in the charged offense or there is rape as sexual battery in the statute books evidence to support a conviction on the 313 So.2d 729, 732-33 (Fig. 1975), Brown 1 State, 206 So.2d 377, 384 (Fla.1968); see Fla.Stat. \$ 919.14 (1969) (replaced by Fla.R. Crim.P. 3.490. Fla.Rules of Court). If the defense requested, however, the court at that time had to instruct on all losser degrees of a charged offense whether or not the evidence supported these lesser de grees. Gillord, 313 So 2d at 733. The was true even though "lim many cases the elements of the lesser degrees are totally distinct from the offense charged Brown, 20. So.2d at 3-1. In 1981, the Florida Supreme Court amended the procedural rule which mandated this result. In re Florida Rules of Criminal Procedure.

This language tracks the current sexual battery statute. Fla Stat Ann. § 794.011(h)(3). Non re-pealed Fla Stat. 794.01 read as follows:

(2) whoever ravishes or carnally knows a per son of the age of eleven years or more, by force and against his or her will ... shall be guilty of a life felony

tience. Fla.R Crim.P. 3.490.

Although Florida's former practice of charging on all lesser degrees may have introduced some "distortion into the factfinding process" by allowing for jury pardon, see Spaziano v. Florida, - U.S. \_\_\_\_\_, 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340 (1984): Hopper v. Erans, 456 U.S. 605, 611, 102 S.Ct. 2049, 2052, 72 L.Ed.2d 367 (1982), no Eighth Amendment problem was created. Florida juries were not faced with a choice of convicting on a lesser offense not supported by the evidence in order to avoid imposing the death penalty. It was this combination of a mandatory death sentence for murder and the required charging on lesser offenses that the Supreme Court condemned in Roberts v. Louisiana, 428 U.S. at 334-35, 96 S.Ct. at 3006-07, as leading to arbitrary results violative of the Eighth Amendment.

Third petitioner's claim that the death penalty is applied in a racially discriminatory manner in Florida depends on the same statistical study rejected by this Court in Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir.), affd. - U.S. -, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); see Spinkellink Wainwright, 578 F.2d 582, 612-616 (5th Cir 197e), cert. denied. 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). The Supreme Court has held this argument to be without merit. Wainwright v. Ford, - U.S. - 104 S.Ct. 3498. - L.Ed 2d - (1984); see Sullivan r. Wainwright, — U.S. —. — - - & n. 3, 104 S.Ci. 450, 451-52 & n. 3, 78 L.Ed 2d 210, 212-13

#### Brown Issue

& n. 3.

Petitioner raises the so-called Brown issue decided in Ford r. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, -U.S. - 104 S.Ct. 201, 78 L.Ed.2d 176 (1953), and suggests we reconsider our decision based on an argument mentioned in a concurring opinion in Ford. The Brown issue involved a claim by 123 death row ducing the list of statutory mitigating facmnates, including petitioner, that the Floris tors " 428 U.S. at 250 n. 8, 96 S.Ct. at 2965

requires that the trial court charge only on - da Supreme Court had examined nonrecord these lesser degrees supported by the evitheir sentences. This Court, sitting en bane, held that no constitutional violation had occurred. Ford v. Strickland, 690 F.2d at 811. This panel is bound by that decision.

#### AFFIRMED.

JOHNSON, Circuit Judge, dissenting:

I dissent from the majority's disposition of this case on two issues: (1) petitioner's claim that he was denied an individualized sentencing hearing as required by the Eighth and Fourteenth Amendments to the Constitution and recognized in Lockett v. Ohio. 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and (2) petitioner's claim that the trial court's imposition of the death sentence after his rejection of a proffered guilty plea by the court violated his rights as guaranteed by the Eighth Amendment and the Fourteenth Amendment's Due Process Clause. Since I would hold that petitioner has clearly stated a claim on which relief may be granted on both of these grounds and that proof of these claims depends in part on facts outside the record before us, I would remand this case to the district court for an evidentiary hearing as to both claims. Bluckledge v. Alli-809, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed 2d 136 (1977).

Petitioner's sentencing hearing was held on February 4, 1977. At that time, the post-Furman 1972 Florida capital sentencing statute governing the sentencer's consideration of mitigating factors. Fla.Stat. Ann. § 921.141(2) and (6), had been interpreted in Proffitt v. Florida, 424 U.S. 242. 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and Cooper r. State, 336 So.2u 1133 (Fla.1976). In Proffitt r. Florida, the Supreme Court in considering the constitutionality of Florda's capital sentencing scheme as a whole noted that, unlike the statute's limitation of the sentencer's consideration of aggravating factors to those listed in the statute. "Ithere is no such limiting language intro-

In Proffitt v. Florida, six Members of Lockett & Ohio this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. None of the statutes we sustained in Gregg [428 U.S. 153, 96 S.Ct. 2909, 49 L Ed.2d 859] and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offensy as an independently mitigating

458 U.S. at 606, 607, 98 S.Ct. at 2965, 2966. Six days after the decision in Proffitt r. Florida, Cooper v. State was decided by the Florida Supreme Court. In Cooper, the Florida Supreme Court apparently held. in language quoted in full below, that Section 921 141 did limit the sentencer's consideration of mitigating factors to these listed in the statute. Later cases binding on this Court have so interpreted Cooper. Ford v. Strickland, 686 F 2d 804, 812 (11th Cir 198% (en banc) ("Ford contends he cannot be faulted for failing to raise the issue

because Fiorida Supreme Court decisons decaded prior to trial indicated only statistory mitigating circumstances could

hold in State v. Decon 1281 5, 26 1 (Ha 1-73) that the rules of evidence are to be relaxed in the sentencing hearing, but that be retained in the sentencing nearing, but that cridence bearing no releasance to the issue was to be excluded. The sole issue it a sentencing nearing under Section 921,141, Florida. Statute 1975, is to examine in each case the stemized agreement and militaring circum status Evidence concerning titles matters have no place in that proceeding any more than purely speculative matters culculated to influence a sentence through emotional ap-peal. Such evidence threatens the presceding with the undisciplined discretion condemned in Furman v. Georgie, 408 U.S. 238, 92 S.Ci. 2726, 33 I. Ed. 2d. 346 (1972).

As to proferred testimons concerning Conper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilisation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that empirement is not a guarantee that one will be law abiding. Cooper has shown that he has

01. as the Court later stated in be considered. The court ruled explicitly to r. State .... Lockett r. Ohio. ... a direct reversal of this view, was not decided until two years later ..."), Foster v. Strick. land, 707 F.2d 1339, 1346 (11th Cir.1983); Proffitt v. Wainwright, 685 F.2d 1225. 1238 and n. 18 (11th Cir. 1982). Cooper was the controlling decision of Florida law in effect at the time of petitioner's sentencing

Two years after the decision in Cooper and one year after petitioner's sentencing trial. Lockett v. Ohio, supra, was decided In Lockett, the Supreme Court held that the limitation of a sentencer's consideration to an exclusive statutory list of mitigating factors violated the Eighth and Fourteenth Amendments. Two months later, in Songer v. State, 365 So.2d 696 (Fla 1978) (on rehearing), the Florida Supreme Court rejected a Lockett challenge to the statute based on Cooper. The court found that the Cooper language concerning the exclusuity of statutory mitigating factors wadicts and that "Cooper is not apropos to the problems addressed in Lincott." Id. at 700. The court held that its construction of Section 921.111(6) since enactment had been that "all relevant circumstances may

conduct has he are event, the lage better. where is list the outstants it instants which it indeed to be reliable for deta minus. the appropriateness of a seach penalty for the most aggressated and monitogated of serious crimes," and we are not free to expand the less The legislative intent to avoid condemical arbitrariness pervades the statute. Section 921 141(2) requires the jury to render us advoces sentence "upon the following matters: (a) Whether sufficient appraisating circumstance whether sufficient mujuating circumstances exist as enumerated in subsection (7), which out weigh the appravating circumstances found to (emphasis added). This limitation is repeated in Section 921 141(3), governing the trial court's decision on the penalty. Both sections 921.141(8) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furnish undeciplined discretion is abhorrent whether operating for or against the death penalty 338 Sc2d at 1139 (emphasis added) (footnets

the principal factors to be considered." Id.

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In light of this history, I agree with the materity that at the time of petitioner's sentencing trial after Cooper but before the clarification in Sanger, the statute was, at test ambiguous; capable of both a constatutional construction in accordance with Luciett as not bruiting the sentencer's conenteration to statutory mitigating factors. is o Proffitt v. Florida, and an unconstitational construction that the statutory list of satisfating factors was exclusive, as in Trape See Provide , Woonwright, suat 120 and up 1s. 19 Stated differcall as the additional argues at the time if the writering trial, the statute was a visitativa due to its ambiguity ?

there has I me a statute's aminguity. to agent totals or must also demonstrate if at the unconstitutional interpretation of the stateds was actual; followed at his estateing trail that in short, the statute the unconstitutional as applied to him. To hard this element of stating a claim on and read may be granted, petitioner al-.ge - its the unconstitutional Cooper to trope tation of the statute affected his senterrity proceedings because his counsel remonaths relied on Cooper as the control long statement of Florida law in his prepar ration and presentation at the sentencing trail Unlike the majority. I cannot conclade based on this record that petitioner's a stations in support of his claim "conclusaid's show that the [petitioner is] entitled to no relief, or that these allegations are se palpatly incredible ... so patently frivclous or false" that summary dismissal is warranted. Blackledge c. Allison, supra. 431 U.S. at 74, 76, 97 S.Ct. at 1628, 1630.

2. The marriers moreads the Cooper Lockett ciacies made by the petitiones. As both the briefs and the mal argument make clear, petitioner first claims that due to its ambiguity th statule was unconstitutional as applied to him e of further man the unconstrained anterpretaremove the ability of the of effective presumered a rangel by operation of state law salting the margines with in the alternative

be considered in mitigation, and that the To the contrary, the lack of any evidentiary factors intered in the statute merely indicate hearing in the state or district courts to develop a record by which we can evaluate this claim and the proffer of evidence supporting this claim by the petitioner in the district court demonstrate that the petition er is entitled to an evidentiary hearing on the issue of whether the unconstitutional construction of the statute actually affect ed the course of his sentencing proceeding

In support of his motion for an evidentiary hearing in the district court, petitioner alleged that his trial counsel, Tabscott, would testify that at the time he represented petitioner at the septencing trial he be heved that Cooper bridges the sentencer consulcration to statutors notigating factors, and that Tabscott would testify that he "focused upon the statutory mitigating As with all 1-22 certain First Amendment circumstances in his pre-trial investigation and preparation as well as in his presentaten of evidence and argument at trial Petitioner proffered an affatavit by Tat. scott in support of these allegations. In this affidavit. Tabscott states that "during my representation of Mr. Hitchene's my perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute.

Petitioner further alleged, and proffered evidence in support of his altegations, that significant evidence of nonstatutory metgating factors could have been presented at his sentencing hearing "had Mr. Tab scott believed that the law permitted the presentation of such evidence." Petitioner proffered the testimony and report of a psychologist who had examined him as establishing the nonstatutory mitigating factors that his behavior in committing the erime was inconsistent with his established patterns of behavior and that he had great

that if it was clear that the statute permitted the introduction of nonstatutory mitigating factors his counsel was ineffective in fading to investe gate and present such evidence. I address only the first of petitioner's courts, that the statute was unconstitutumal as applied to him and c put in slow time majority, said particular soft ment simple as an ineffective assistance

Cite as 745 F.26 1332 (1984)

also proffered testimony and affidavits of arious family members attesting his difficuit childhood and his good character.

The record of petitioner's sentencing hearing does not contradict the affidavit of petitioner's counsel that he believed only statutory mitigating factors could be presented at his hearing. Nor does the record reveal that substantial nonstatutory mitigating evidence was in fact presented only one witness, the petitioner's brother. testified at the sentencing hearing as to circumstances that could arguably be identified as nonstatutory mitigating factors: the petitioner's father had died of cancer. tetitioner's mother worked on a farm, and the witness had allowed petitioner to babyat his children. Further testimony from this witness that petitioner's habit of that the statute was ambiguous and that sucking on automotive gasoline seemed to affect hum mentally was argued by coun-statute governed his sentencing hearing sel as a statutory psychological mitigating through his attorney's reliance on Cooper. factor. The bulk of the argument by petitioner's counsel was an evaluation of whether the statutory mitigating factors fact supports petitioner's attack on the did or did not apply in this case. Petitioner's counsel reminded the sentencing jury of earlier testimony concerning patitioner's track ground, but he did not argue this testimons as a mitigating factor, asking only that the jury consider it "for whatever purposes you may doem appropriate." In short, the slender evidence from the state sentencing hearing record that some mitigating factors not listed in the statute were, to a limited extent, before the sentencing jury does not conclusively establish that petitioner's counsel in fact believed presented and fully argued to the jury as to distatutory mitigating factors.

Nor does the precedent of this Court indicate that petitioner's profier was insufficient to entitle him to an evidentiary hearing Profitt v. Wainwright, supra, rejectsel based on an attorney's affidavit that he was available.

3. Concern to the majority's suggestion, this extdense, although produced through a psychologists evaluation does not also fall within the statutory matigating factor than the capital feli-\*16 5 3mm 11

potential for rehabilitation.3 Petitioner had relied on an interpretation of Florida law that precluded the presentation of nonstatutory mitiguting factors:

[T]he defense attorney's belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Fla Stat. 4 921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore justifi able and fully within the sixth amend ment standard of reasonably effective assistance

685 F.2d at 1248. The petitioner in this case, unlike the petitioner in Proffitt, challenges the Florida statute as applied to him. As a necessary step in his argument the unconstitutional interpretation of the petitioner claims that his attorney reasonably relied on Cooper. Proffitt, then, in statute. In Ford v. Strickland, supra. this Court held that the jury instructions given at the defendant's sentencing hearing did not result in the jury's perceiving that it was limited only to the consideration of statutory mitigating factors because both the trial court and counsel did not so perceive the law. In Foster r. Strickland. supen, the Court held that no prejudice had been shown from the defendant's failure to object to similar jury instructions because the defendant did not proffer any nonstatuthat such evidence could be, and was, tory mitigating evidence to support his claim. Neither Ford nor Foster speaks to the present case in which the petitioner has proffered both evidence that his counsel perceived Florida law to limit the presentation of mitigating evidence to those factors listed in the statute and evidence that subed a claim of ineffective assistance of coun-stantial nonstatutory mitigating evidence

in was committed while the defendant was under the influence of extreme mental or emotion all disturbance." Habert Jun. 4 921 141(406)

period on the potationer to the contract course. these factors, present in this case it if it att of the efficiency to an explorant. Com the proper analysis from that in the that it of the adjusted that test for in-ternal transmitter characters the Fierda to start dark at of settlet and deprive Signor the respectation of the start the at produced the extract, then of more district intenting evalues such eve dere was have been more igneral and presented at his sentencing hearing. Although the inference is clear from the aff. davit and petitioner's allegations I recognize that the proffered affidavit does not explicitiv state this causal relationship between counsel's reliance on Cooper and the course of his sentencing hearing. This does not, however, as the majority seems to assume, require a summary dismissal of betitioner's claims, but rather it is in both law and logic further demonstratust of the need for an evidentiary hearing in this case. We cannot conclusively determine from the evidence before us whether jettioner's allegations of this causal relationship are indeed fact. If, as petitioner alleges his counsel's reliance on Cooper as limiting the sentencer's consideration to statutory mitigating factors precluded counsel from investigating or presenting available evidence of monstatutory mitigating factors then petitioner has demonstrated that the unconstitutional interpretation of the ambiguous statute did affect his sentencing bearing and relief should be granted

I would further hold that petitioner has stated a claim of constitution d deprivation through he allegations that, pror to trial the trul court approved of the pro-ces tion's offer of a plea agreement of life impressment, and thus the trial court at wast implicitly agreed to impose life imprionrate as a sentence if politically were to accept this ofter, and after trial the court sesterced petitioner to death without make the written findings as to why before trial a life sentence was proper and after trial the death sentence was imposed.

Bordenkircher v. Hayes, 434 US 357. 95 S.Ct. 663, 54 L.Ed.2d 604 (1978), relied on by both the majority and the district court, does not apply to the present case. Bordenkircher involved the limited factual situation where a state prosecutor carried out a threat to re-indict the defendant on a the plea bargaming process or the possible life sentence if he pleaded guilty but could

I saw I would book the evidence professentiers of the death parales. But, if Is derte timber & Proce Set . 711 80 ST 2072 21 Lines 676 17 676

the Superme Court belither a date men could not in page a greater senteter on it defendant after re-trial following a specie ful argual unless "the reasons for its doing so affirmatively appear in the record." Id at 726, 89 S.Ct at 2081. In the absence of such record evidence, the chilling effect of an inference that the defendant was being punished for exercising his constitutionally protected right to appeal or collaterally attack his conviction was held to violate the Fourteenth Ametal ment's Due Process Clause.

Relying on the equally protected constrtutional right to trial by jury, and the equally recognized principle that the "Unistatution forbuts the exaction of a penalty for a defendant's unsuccessful choice to stand trial, due to the chilling effect on the exercise of the right Smath : Warn wright, 60:1 F 2d 1194 1196 (11th Cir 19-1) the Ninth Circuit has beld in noncapilo cases that

10 nee it appears in the record that the court has taken a hand in plea bar, aining that a tentative sentence has been discussed, and that a har his sentence has followed a breakdown in negotiations, the record nast show that no me proper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upor the facts of his case and his personal history and not as punishment for his refusal to

United States v. Stockwell, 472 F 2d 11-1187-88 (9th Cir.1973)

Moreover, the Supreme Court has expressly recognized that the Eighth Amendment's heightened due process reliability requirement in capital cases applies with equal force to permissible plea bargaining practices. In United States v. Jackson, 390 U.S. 570, 28 S.Ct. 1209, 20 L.Ed 2d 138 (1968), the Supreme Court invalidated the not plead guilty. Bordenkirchir did not procedures of the Federal Kidnapping Act ed that "the death penalty, which is 'unique childen Justice Stewart, the author of Burdenkircher, concurred in the result in not apply because the death penalty was not involved and Kordenkircher did not apply because it simply involved the prosecutor's acting within the adversary system and not a state statute as in Corbitt. 400 1 s 200 2s 40 S Ct. 201-02

Finally, the Supreme Court has recognired the unique power of the death penalto to curve guitty pleas and thus chill the curiese of the constitutionally protected eight to trial to sury. In Jackson, the Court stated that, because "accepted of the right to very trial may cost in defendand his life, the Federal Kainapping Act I's a '72 se Si't at 1211. The evil in correct guilty pleas and jury waivers but them Id at hell as S Ct. at 1227.

recision to impose the death sentence be.

4. The warden appelled argues that the Florida Suprems Court on direct appeal made historical feedings of fact on this issue entitled to the statutory presumption of correctness under 28 U.S.C.A. § 2234(d). On direct appeal, the Figure da Supreme Court rejected the petitioner's claim that "the trial court offered him a sentence of life imprisonment in return for a plea of noto contendere as charged and thus that the trial court imposed the death sentence because he exercised his right to a jury trial. 413 So.2d at 746 The Florida Supreme Court concluded Hitchcock's version of the facts surrounding

this point is not supported. Rather, it appears from the record, as supplemented. that the judge agreed only to consider such an agreement if Hitch.ock were to plead guilty. agreement if Hitchcock were to plead pulls.
Because Hitchcock refused to consider a plea
the court never had to consider whether to
accept the plea bargain. When detense court al reminded the judge during a menting proresponded they was never an under

reveive a death sentence if he chose to and appear to be, based on reason," Gordstand trial. In Corbitt v. New Jersey, 439 nev c. Florida, 430 U.S. 319, 358, 97 S.C., U.S. 212, 39 S.C., 492, 58 L.Ed.2d 466 1197, 1204, 51 L.Ed.2d 393 (1977), is not (1975) the Supreme Court approved the met by a system in which the treal court practice of extending leniency for a guilty tenders a life sentence as part of a plea plea in noncapital cases, but expressly notdeath sentence without explanation after in its severity and irrevocability, is not the defendant has exercised his right to involved here. Id. at 217, 99 S.Ct. at 496 stand trial. The inference that the defendthe defendant has exercised his right to national field for the determinant of the field for the fi tected right to trial is, without record evidence to the contrary, unacceptable 1 Corbitt on the grounds that Jackson day would therefore hold that petitioner's allegations state a claim under the Eighth Amendment and the Fourteenth Amendment's Due Process Clause

A transcript of the plea conference at which the alleged offer to accept a life sentence in return for a guilty plea was either tendered to defendant and his coursel or approved by the trial coart is not a part of the record now before this Court. No evidentiary hearing to determine the accuracy of petitioner's crucial allegation that the trial court in fact approved such an offer has been held in either the statecourts or the distract court. Instead, the sole evidence before this Court on this issue are remarks made at petitioner's senthe statute was "not that it necessarily teneng hearing, ere majority opinion, siepro. at note 2, which are ambiguous at best and are insufficient to evaluate the accuracy of petitioner's claim. I therefore would Ir aght of this precedent, it is clear the bold that petitioner is entitled to an eviden-Eighth Amenument's requirement that a tiary hearing in the district court on this

standing because your client didn't wast to consider one plea-

Petitioner notes that the record before the Florida Supreme Court consisted solely of the remarks made during senienting and was sup-plemented only by affidavits of both petitioner's counsel and the prosecutor. The affidavit of peritioner's counsel, executor. The affidavit of peritioner's counsel, executor contemporaneously with the trial proceedings, states. "Judge Paul indicated that he would accept a plea of nole contendere as charged and that [petitioner] would be aentenced to this purposentment." The would be sentenced to life impressionment. The prosecutor's affidant is to the contrary "ludge Paul indicated that he would consider little State's) recommendation, doubld the defend ant actually plead guilty as charged." Pentiumer also argued to the Florida Supreme Court that should it find the record insufficient and the affidavits contradictors, it should remand to the state habeas center for an evidentiary licaring Based on these fact, petitioner claims that the Horala Supreme Cour's Lettindine procedure

745 FEDERAL REPORTER, 24 SERIES 1348

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC before GODBOLD, Chief Judge, RO. NEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.

#### BY THE COURT

A member of this court in active service having requested a poil on the application for releaving on bane and a majority of the pages in this court in active service having autol a fusor of granting a rehearing on

IT Is oblig KEII that the cause shall be furear, is the court en bane with neal argue of on a date hereafter to be facil I care will specify a briefing schadule for the fining of en banc brufs

#### SENTENCE

cable If, through impossibility or inability, the trial or cable II, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the incomplete in the interest of the incomplete in the penalty. If the trial jury jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the sentencing processing shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportune ty to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. (2) ADVISORY SENTENCE BY THE JURY —

After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court.

based upon the following matters:
(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6):

(b) Whether sufficient mitigating circumstances exist as enumerated in sub-ection (7), which out-weigh the aggravating circumstances found to exist;

(c) Based on these considerations, whether the defendant should be sentenced to life 'imprison-

ment or death

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH - Notwithstanding the recommenda-tion of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of hie impresented or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts

(a) That sufficient aggravating circumstances

exist as enumerated in subsection (6), and (b) That there are insufficient mitigating circum-stances, as enumerated in subsection (7), to outweigh the aggravating circumstances

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings PENALTY - Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentencing. ceedings If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. tenced to death or life imprisonment as authorized 775 082

4 REVIEW OF JUDGMENT AND SEN-

by \$ 775 082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practi-

921.141 Sentence of death or life imprison

ment for capital felonies; further proceedings to determine sentence.—

1 SEPARATE PROCEEDINGS ON ISSUE OF

(h 921

Ch. 921

SENTENCE

ENCE. - The judgment of conviction and sentence dian ath shall be subject to automatic review by the Surreme Court of Fiorida within 60 days after certifigures, by the sentencing court of the entire record. walter the time is extended for an additional period of the sheed & days by the Supreme Court for good and have priority over all other cases and shall be part in accordance with rules promulgated by the

AGGRAVATING CIRCUMSTANCES -Agtavalus' cacunestances shall be limited to the fol-

The capital felons was committed by a person

th. The defendant was previously convicted of an after capital felony or of a felony involving the and or threat of violence to the person.
The defendant knowingly created a great risk

of death to many persons
d. The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robters, rape, arson, burglary, kidnapping, or aircraft paracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

The capital felony was committed for the pur-

piece of avoiding or preventing a lawful arrest or

therting an escape from custody.

The capital felony was committed for pecu-

mins gain

The capital felony was committed to disrupt
as binder the lawful exercise of any governmental
action or the inforcement of laws.

n. The capital felony was especially hemous

6 MITIGATING CIRCUMSTANCES - MIGI of the defendant has no significant history of

prior criminal activity

b The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance

The victim was a participant in the defendand a conduct or consented to the act

d The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor The defendant acted under extreme duress or

inder the substantial domination of another person for The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of low was substantially impaired.

g. The age of the defendant at the time of the

Meanry — 27's ch 1954 1996 CGL 1990 Supe M68-246 + 139, ch - t - s - t ch 17's a 9 ch 12'34 a 1 ch 1957 Physical energy courses to the editors. Note - Francisco energy for the editors.

F.S.1979 SENTENCE Ch. 921 CHAPTER 921

SENTENCE

tenced to death or life imprisonment as authorized tenced to death or life imprisonment as authorized by s. 775 082. The proceeding shall be conducted by s. 775 082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guit of the accused, the trial judge may summon a special juror or cused, the trial judge may summon a special juror or juriors as provided in chapter 913 to determine the juriors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a gury impaneled for 'hat purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating, or mitigating circumto any of the aggravating or mituating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probasuch evidence which the court deems to have proba-tive value may be received, regardless of its admissi-bility under the exclusionary rules of evidence, pro-vided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction shall not be construed to authorize the introduc-tion of any evidence secured in violation of the Con-stitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death

21 ADVISORY SENTENCE BY THE JURY—

After hearing all the evidence, the jury shall deliber ate and render an advisory sentence to the court. based upon the following matters

based upon the following matters

state Whether sufficient aggravating circumstances exist as enumerated in subsection (b). Whether sufficient mitigating circumstances.

exist which outweigh the aggravating circumstances found to exist, and

Based on these considerations, whether the defendant should be sentenced to life imprisonment

or death
(3) FINDINGS IN SUPPORT OF SENTENCE
OF DEATH—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances. ing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts tence of death is based as to the facts (a) That sufficient aggravating circumstances (a) That sufficient aggravating circumstances (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based supported by specific written findings of fact based supon the circumstances in subsections 5 and 6 and upon the records of the trial and the sentencing proupon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to

determine sentence.

SEPARATE PROCEEDINGS ON ISSUE OF PENALTY - Upon conviction or adjudication of penalty - Upon conviction or adjudication of suit of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced. F.S.1979

SENTENCE

Note.-Former s 919 23

Ch. 921

sentence of life imprisonment in accordance with s. 775.082

4 REVIEW OF JUDGMENT AND SEN-TENCE —The judgment of conviction and sentence of death shall be subject to automatic review by the of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be bested in accordance with rules promulated by the heard in accordance with rules promulgated by the

AGGRAVATING CIRCUMSTANCES -Aggravating circumstances shall be limited to the fol

iowing
The capital felony was committed by a person

ander sentence of imprisonment.

b. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The defendant knowingly created a great risk

of death to many persons
de The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robherry rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or dis-charging of a destructive device or bomb.

e. The capital felony was committed for the pur-

pise of avoiding or preventing a lawful arrest or effecting an escape from custody.

of The capital felony was committed for pecu-

niary gain.

The capital felony was committed to disrupt or hinder the lawful exercise of any governmental

h The capital felony was especially heinous. atrocious or cruel

The capital felony was a homicide and was

committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justi-

fication (6) MITIGATING CIRCUMSTANCES -Mitigating circumstances shall be the following:

a The defendant has no significant history of

prior criminal activity.

b) The capital felony was committed while the detendant was under the influence of extreme men-

tal or emotional disturbance. c) The victim was a participant in the defend-ant's conduct or consented to the act.

(d) The defendant was an accomplice in the capi-

tal felony committed by another person and his par-

ticipation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

f. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired

. The age of the defendant at the time of the History -- 275. ct 19554 1939 CGL 1947 Supp M683/46 + 118. ct. 1. ct. 1. ct. 1272 + 9 ct. 72724 + 1 ct. 1-379 + 248. ct. 77 304 + 1. ct. 73 304 + 1. ct. 77 304 + 1. ct. Crime

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

JAMES ERNEST HITCHCOCK,

Petitioner,

----

vs.

LOUIE L. WAINWRIGHT, etc.

SEP 27 5 14 PN 18

#### ORDER

Por the reasons set forth in the Memorandum of Decision filed on even date herewith the court finds that an evidentiary hearing and further oral argument are unnecessary. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the Amended Petition for Writ of Habeas Corpus filed herein on 9 June 1983 is hereby dismissed.

FURTHER ORDERED that the stay of execution ordered by this court on 17 May 1983 shall terminate at 12:00 o'clock noon on 17 October 1983.

mail a copy of this order and the <u>Memorandum of Decision</u> to the Petitioner, his attorneys, and the attorneys for Respondent. The Clerk of this Court shall also provide

telephone notice of this order to the Clerk of the United States Court of Appeals for the Eleventh Circuit and shall thereafter mail to said Clerk by certified mail a copy of this order and the Memorandum of Decision.

DONE AND ORDERED in Chambers at Orlando, Plorida, this 22nd day of September, 1983.



Copies mailed to:

Richard B. Greene, Esquire Richard H. Burr, III, Esquire Assistant Public Defenders 15th Judicial Circuit of Plorida 224 Datura Street - 13th Floor West Palm Beach, Florida 33401

Richard B. Martell, Esquire Assistant Attorney General 125 North Ridgewood Avenue Daytona Beach, Florida 32014

Mr. James Ernest Hitchcock Florida State Prison Box 747 Starke, Florida 32091

Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISEON
ORRANDO DIVISEON
O

JAMES ERNEST HITCHCOCK,

Petitioner,

No. 83-357-Civ-Or1-11

vs.

LOUIE L. WAINWRIGHT, etc.,

Respondent.

## MEMORANDUM OF DECISION

James Ernest Bitchcock filed a Petition for a Writ of Babeas Corpus on 13 May 1983 and thereafter filed an Amended Petition for a Writ of Babeas Corpus on 9 June 1983.

On 31 May 1983, Respondent filed a Motion to Dismiss. On 17 June 1983, the Motion to Dismiss was argued and treated by the court and the parties as having been directed to the Amended Petition. The court has reviewed the Amended Petition against the Motion to Dismiss and, as contemplated by Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, has independently reviewed the Amended Petition for arguable merit. The court has included in its review of the Amended Petition the entire state court trial record. The record was filed by the Respondent and is referred to at length in the Amended

<u>Petition</u>. On the basis of its review, the court has concluded that the <u>Amended Petition</u> for habeas corpus relief lacks arguable merit.

that the evidence was insufficient to support the felony murder theory. The pertinent homicide statute is \$ 782.04(1)(a), Fla. Stat. (1975). It provided: "The unlawful killing of a human being . . . when committed by a person engaged in the perpetration of . . . any . . . involuntary sexual battery . . . shall be murder in the first degree and shall constitute a capital felony . . . ". The pertinent statute defining sexual battery is \$ 794.011, Fla. Stat. (1975). It provided:

A person who commits sexual battery upon a person over the age of eleven years, without that person's consent, and in the process thereof . . . uses actual physical force likely to cause serious personal injury shall be guilty of a life felony . . .

The statute defines the phrase "serious personal injury" as "great bodily harm or pain, permanent disability, or permanent disfigurement." (Emphasis added).

The Petitioner's confession which was introduced in evidence as a part of the state's case in chief contains an admission by the Petitioner that early in the morning of 31 July 1976 he entered the bedroom of his brother's thirteen year old stepdaughter and had sexual intercourse with her. Following this, according to the Petitioner's own confession, she stated that she was hurt and desired to tell her mother. The Petitioner admitted in his confession that he struck her and carried her from the house, choked her to death and hid her body. Testimony presented also in the state's case in chief by Guillermo Ruiz, the medical examiner for Orange County, established that the victim had abrasions on her neck and also had evidence of trauma to her left eye and laceration around her left eye. Dr. Ruiz also testified that the girl's hymen had been lacerated within twenty-four hours before her death and that hair and sperm were found in her vagina.

The age of the victim, the fact that she was of previously chaste character, her insistence on telling her mother and the Petitioner's admission as to the time of the occurrence could have led a reasonable jury to the conclusion that the sexual relationship was not consensual. The same evidence also suggests that physical force likely

Court, however, in the direct appeal in this case concluded that the error was harmless. This court's review of the record leads it to the same conclusion. As mentioned above, there was adequate evidence to take the case to the jury on the felony murder theory. The Petitioner's defense counsel anticipated the possibility that the motion would be denied and presented testimony dealing with the consensual nature of the sexual relations between the Petitioner and the victim. Furthermore, there is nothing in the record to suggest that the defense counsel's strategy was adversely affected by the court's ruling.

The third ground asserts that the trial court kept out nearly all of the evidence proffered by the Petitioner in support of his defense. Petitioner's defense was that his brother Richard had killed the victim. To support his theory, the Petitioner tried to show that his brother Richard had a reputation for violence whereas he, the Petitioner, treated young children well. The Petitioner also argues with respect to this ground that he was denied an opportunity "to show why he would have initially confessed . . . despite his innocence . . . ".

The transcript of the testimony negates the validity of the third ground. Evidence of the Petitioner's character for nonviolence was repeatedly admitted through his own witnesses and to some extent through the testimony of his brother Richard and his sister-in-law (Richard's wife) Judy, both of whom were called as witnesses for the state.

Judy Bitchcock testified that in July 1976 the Petitioner was living in her home with her children and Richard. She testified she never saw the Petitioner hit or discipline any of the children (T. 267). Richard Hitchcock testified for the state that the Petitioner got along "all right" with the children.

Roy Carpenter, Sgt. Rick Dawes, Archie Sooter,
Martha Hitchcock, James Hitchcock, Pay Hitchcock and Brenda
Reed were witnesses called by the Petitioner. Carpenter
testified that on the day after the "incident" (meaning the
day on which the victim's body was found) when he saw the
Petitioner in Winter Garden, the Petitioner said he wanted
to organize a search party to look for his niece. Carpenter

testified he never knew the defendant to commit "violence"

(T. 725). Sgt. Rick Dawes of the Winter Garden Police

Department testified that the Petitioner came into the

Winter Garden Police Department on 31 July 1976 and

Winter Garden Police Department on 31 July 1976 and

surrendered peacefully (T. 227). Sooter testified he was a

former roommate of the Petitioner (T. 731). He described

former roommate of the Petitioner (T. 731) and

the Petitioner's character as "calm and jovial" (T. 732) and

testified the Petitioner had a girlfriend to whom he never

testified the Petitioner direct any violence (T. 733).

Martha Hitchcock, the Petitioner's sister,
testified that she lived with the Petitioner for over
thirteen years and never knew him to be a violent person
thirteen years and never knew him to be a violent person
T. 737). James Hitchcock, one of the Petitioner's older
brothers, gave similar testimony (T. 739). James Hitchcock
also testified the Petitioner stayed for an unspecified
also testified the Petitioner stayed for an unspecified
period with him and his three children (T. 741-742). Fay
the Petitioner for nine years and had never known him
known the Petitioner for nine years and had never known him
to exhibit violence (T. 744). Brenda Reed, another sister
of the Petitioner, testified she had never known him to

The testimony reveals that when the Petitioner was taken into custody he did not, contrary to the allegation in the Amended Petition, initially confess to the killing of Cynthia Driggers. The Petitioner testified that on the day of his arrest, he denied any involvement. It was not until four days later that he confessed (T. 771-772). At trial, the Petitioner explained in detail why he confessed. His first reason was that he had been in isolation for a period of four days and wanted to die (T. 772). His second reason was that his girlfriend had left him (T. 772). Then the Petitioner explained that he had been on his own since age thirteen and was then age twenty. He further testified his father died when he was only six (T. 773-774). The final reason which he advanced for changing his testimony was that his brother Richard had been like a father to him and because of Richard's arthritic condition he "couldn't see him (Richard) doing this time" (T. 777). After that statement, the Petitioner said, "But from what my parents have stated to me and shown to me, I've took a crime for him before . . . At this point an objection to the testimony was voiced by the state's attorney and the objection was sustained. Although there was no order from the court

striking any portion of the testimony, the objection could only have been understood as having gone to the hearsay statement attributable to the Petitioner's parents. Hence, the record does not reflect that the Petitioner was prevented from developing his character for nonviolence or explaining why he made a confession totally inconsistent with his trial testimony. The transcript does indicate, however, that the Petitioner's attempts to introduce evidence related to Richard's character or reputation for violence were routinely rebuffed (T. 737, 740, 744, 777-778, 750-751, 794-795).

Normally rulings on the admission of evidence are not a basis for habeas corpus relief. Nettles y.

Wainwright, 677 F.2d 410, 414 (5th Cir. Unit B, 1982).

Where, however, such rulings preclude a defendant from adducing highly relevant testimony in support of his defense, they may of course constitute a denial of the Fourteenth Amendment's guarantee of a fair trial. Green y.

Georgia, 442 U.S. 95 (1979); Wilkerson y. Turner, 693 F.2d

121, 123 (11th Cir. 1982). The issue then becomes whether or not the exclusion of the proffered testimony dealing with Richard's violent character and Petitioner's having

previously taken some blame (i.e. "took a crime") for Richard was so relevant to the defense that its exclusion denied the Petitioner a fair trial.

Evidence of a person's character or a trait of character is usually not admissible to prove that he acted in conformity therewith on a particular occasion. See Rule 404(a), Ped. R. Evid. Whatever slight relevance such evidence might have is not sufficient to overcome the policy which favors its exclusion to protect reputation and to diminish the possibility of misleading the trier of fact. The reputation of Richard for violence had such slight probative value to support the Petitioner's contention, this court cannot conclude that its exclusion denied the Petitioner a right to a fair trial. The evidence shows without question that Richard was married to the mother of the thirteen year old victim and had been living with her and her four minor children (including the victim) for a period of at least two years before the murder (T. 273-274). Under these circumstances, there is just simply no logical connection between the proferred testimony and the fact sought to be corroborated. Similarly the proffered hearsay evidence was of such minimal significance its exclusion did not violate Petitioner's right to due process.

The fourth ground for relief asserts that a communication between the trial court and the jury in the absence of defense counsel denied Petitioner a fair trial. During the course of the jury deliberations, the jury sent a note to the trial judge which asked: "Is it required for us to recommend death penalty or life at this time?" The trial judge without consulting counsel for the Petitioner or the state responded: "You should not consider any penalty at this time - only guilt or innocence. See Record, page 165. The Petitioner argues that this communication to the jury denied him due process. According to Petitioner, it implied that the trial judge viewed the Petitioner as guilty and at the same time suggested to the jury that it should not consider the seriousness of the possible penalty in arriving at a verdict as to guilt or innocence. In the opinion of this court, the argument is frivolous. The trial judge had earlier given the jury without objection an instruction virtually identical to that included in his response to the jury's note. At the close of the evidence on the guilt phase of the trial, the judge instructed the jury:

You are not to be concerned at this point with the imposition of any penalty in the event you reach a verdict of guilty.

. [I]f you return a verdict of guilty of Murder in the First Degree, you will then be called on, in a separate sentencing proceeding, to return an Advisory Sentence as to whether the punishment should be death or life imprisonment, which Advisory Sentence the Court is not required to follow. When you have determined the guilt, or innocence you have determined the guilt, or innocence your solemn obligation under your oaths as Jurors.

The trial judge also instructed the jury in the following language that the decision on guilt or innocence was theirs and that no comment by him should be taken as implying his view as to guilt or innocence:

Nothing I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find.

Pinally, it is obvious from the note itself that
the jury was well aware that the death penalty was a
possible sanction attendant upon the conviction. Nothing in
the judge's response could rationally be said to have

diminished the seriousness of the offense in the jury's mind.

The fifth ground for relief is that the aggravating circumstances considered by the jury failed to channel sentencing discretion as required by the Eighth and Fourteenth Amendments. The first argument advanced in support of this ground is that the aggravating circumstance of sexual battery was not supported by adequate evidence. As noted above, the record contains adequate evidence to support the felony of sexual battery as defined in \$ 794.011(3), Pla. Stat. (1975).

The Petitioner also argues under this ground that the catalog of aggravating circumstance delineated in the death penalty statute refers to "rape" not sexual battery.

See § 921.141(5)(d), Pla. Stat. (1975). When the Plorida death penalty statute was initially adopted, the term "rape" was used in Plorida to denote the well-known offense. See § 794.01, Pla. Stat. (1973). Unfortunately the term was not modified in the death penalty statute when in 1974 the Plorida legislature redefined "rape" in a comprehensive statute using the terminology "sexual battery". See

13

5 794.01, <u>Pla. Stat.</u> (1974). Rape was defined in the statutes of Plorida in effect when the death penalty statute was first enacted as follows:

794.01 Rape and forcible carnal knowledge;
penalty.(1) Whoever of the age of seventeen years or
older unlawfully ravishes or carnally knows a
child under the age of eleven is guilty of a
capital felony, punishable as provided in
§ 775.082.

§ 794.01(1), <u>Fla. Stat.</u> (1973). The offense of rape as thus defined is for all practical purposes the same as "sexual battery" defined in the present Plorida statute and included in the trial judge's charge.

The remaining contentions which the Petitioner makes in support of the ground in question simply take issue with the validity of the aggravating circumstances which may be considered under the Florida death penalty statute. The statute, however, has been held to be constitutional and the Petitioner's argument is thus foreclosed. See <a href="Proffitt y.Florida">Proffitt y.Florida</a>, 428 U.S. 242 (1976), and <a href="Barclay y.Florida">Barclay y.Florida</a>, No. 81-6908, \_\_\_\_ U.S. \_\_\_ (6 July 1983).\_\_\_\_

The Petitioner's sixth ground for relief is that \*(his) death sentence was imposed in proceedings which precluded by operation of law the consideration of relevant mitigating circumstances in violation of the Eighth Amendment requirement that there be no bar to the presentation and consideration of relevant mitigating evidence." With respect to this ground, the Petitioner argues that the trial judge refused to consider as mitigating the evidence relating to the Petitioner's mental and emotional problems, his voluntary surrender, the evidence as to his nonviolent character, doubt of guilt, and the fact that the state offered a life term in return for a plea of guilty. The short answer to this contention is that the trial judge was not required to consider those factors as mitigating. As pointed out in Barclay v. Florida, supra, the sentencing decision calls for the exercise of judgment. The only requirement of the Constitution is that the judgment be directed by suitable statutory guidelines. The trial judge stated before pronouncing sentence: "The court has weighed and considered the total evidence received in this case . . . \* See transcript of Sentencing Proceedings 11 Pebruary 1977, at page 6.

Also under this ground, the Petitioner argues that the judge limited the jury's consideration to the list of mitigating circumstances set forth in the Florida death penalty statute. It is true that the jury was instructed on the mitigating circumstances delineated in § 921.141(6), Fla. Stat. (1977); however, the jury was not precluded from consideration of any relevant evidence offered in mitigation of punishment. The trial judge told the jury its consideration of aggravating circumstances was limited to the statutory list. In contrast, he instructed the jury with reference to mitigating circumstances:

Should you find, however, sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances which you have found to exist. The mitigating circumstances which you may consider shall be the following: .:!. [the statutory mitigating circumstances]... If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive and (sic) in arriving at your conclusion as to the sentence which should be imposed.

Transcript of Advisory Hearing at 55-58.

Purthermore, no restriction was imposed on the evidence which Petitioner offered at the sentencing trial, and, in fact, testimony was adduced of nonstatutory mitigating circumstances dealing with his family background. In his argument to the advisory jury defense counsel discussed at some length Petitioner's family history, his nonviolent character, including the fact of his voluntary surrender, and his capacity for rehabilitation if offered a life sentence (T. of Advisory Hearing p. 12-26). The Petitioner's argument is foreclosed by <u>Pord v. Strickland</u>, 696 F.2d 804, 811 (11th Cir. 1983) because, for the reasons mentioned, neither the jury nor the trial judge was denied the use of any relevant evidence of mitigation. See also Antone v. <u>Strickland</u>, 706 F.2d 1534 (11th Cir. 1983); <u>mod</u>. on <u>rehr</u>. No. 82-5120, <u>Slip Op</u>. 6 Sept 1983.

Pinally, the Petitioner argues that available evidence in mitigation was not presented either because defense counsel was ineffective or because the Florida statute precluded evidence of nonstatutory mitigating circumstances. The Florida statute in effect at the time did not expressly limit the jury's consideration to the mitigating circumstances delineated therein. Although

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dictum in Cooper v. State. 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), suggested that the statutory mitigating circumstances were exclusive, decisions of the Florida Supreme Court published prior to the trial indicate that the statutory mitigating circumstances were not exclusive. Those cases are reviewed in Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). The Petitioner suggests that his counsel was ineffective at the penalty phase of the trial because he did not adduce testimony of a psychologist discussing Petitioner's character and his capacity for redemption. Petitioner embodied in his Amended Petition at page 41 an excerpt from a report by a psychologist used at his executive clemency hearing as an example of what effective counsel should have offered. This type evidence Petitioner claims would have had two purposes. One would be to show doubt of guilt - the other to show Petitioner's capacity for rehabilitation. Counsel can hardly be considered ineffective in a capital case because at the penalty phase he did not adduce evidence to raise a doubt of guilt. Obviously at that stage, doubt of guilt has been eliminated as an issue for the jury's consideration. Counsel cannot be held ineffective, unless his choice of strategy was so patently unreasonable that no

substantial prejudice resulted from the choice. Adams v.

Wainwright, 709 P.2d 1443 (11th Cir. 1983); Wiley v.

Wainwright, 709 P.2d 1412 (11th Cir. 1983). In the present case, substantial evidence as to Petitioner's character and background was presented to develop mitigating factors, and Petitioner's attorney strongly argued to the advisory jury the possibility of rehabilitation. In light of what was done, counsel cannot under the established standard be deemed ineffective for not producing opinion evidence from a psychologist.

The seventh ground for relief is stated as follows in the petition: "Petitioner's Eighth Amendment right to be punished in proportion to his crime, and his Fourteenth Amendment right to due process, were violated by the trial court's approval of the state's offer to Petitioner of a plea of nolo contendere and life imprisonment, followed by the court's imposition of the death sentence after Petitioner rejected the plea offer and proceeded to trial." Even if Petitioner's factual assertions are true, this ground is patently without merit. The argument of the Petitioner basically is that having rejected the tendered

plea agreement, he could go to trial with immunity from the death penalty. The Petitioner cites North Carolina v.

Pearce, 395 U.S. 711 (1969), United States v. Jackson, 390

U.S. 570 (1968), and Corbitt v. New Jersey, 439 U.S. 212

(1978) as supporting his contention. None of these cases supports the contention, and Bordenkircher v Bayes, 434

U.S. 357 (1978) stands clearly in opposition.

The eighth ground for relief is that, "The Plorida death penalty statute, as applied, deprives death-sentenced individuals, whose sentences are based upon erroneously found aggravating circumstances, of critical Eighth and Fourteenth Amendment rights, because the Florida Supreme Court consistently sustains such death sentences so long as there is at least one valid aggravating circumstance, and no substantial mitigating circumstances, present." This ground is without merit and subject to summary dismissal on the authority of Barclay v. Plorida, supra.

The ninth ground for relief is that, "The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case vitiated the court's unique responsibilities in the

review of capital prosecutions." With respect to this ground the Petitioner argues that the Plorida Supreme Court failed to review the aggravating circumstances, failed to review the claim that nonstatutory mitigating factors should have been found, and failed to review the trial court's failure to find as mitigating the mental or emotional problems of the Petitioner and doubt about his guilt.

with regard to the assertion that doubt about guilt should enter into the sentencing equation, the Petitioner's contention is without any support known to this court. The sentencing aspect of the trial does not commence until guilt has been established. Therefore, doubt about guilt should not enter the sentencing process. If a doubt about guilt exists, such would be a ground for a reversal of the conviction itself.

It is clear from the dissent in connection with the plenary appeal that the mental and emotional problems of the Petitioner were considered by the Florida Supreme Court. Furthermore, the opinion of the majority reflects that the case was carefully reviewed on the grounds presented.

The Petitioner's penultimate ground for relief challenges the Florida Supreme Court's former practice of reviewing psychological profiles of persons sentenced to death. This ground for relief has been foreclosed by Pord v. Strickland, supra.

The final ground for habeas relief is: "As applied, the Plorida death penalty statute violates the Eighth and Pourteenth Amendments because it fails to channel jury discretion and permits the interjection of irrelevant factors into the sentencing process by the jury and judge."

Most of the argument embodied in the petition in support of this ground has been foreclosed by <a href="Proffitt">Proffitt</a>

V. <a href="Florida">Plorida</a>, <a href="Supra">Supra</a>, wherein the Supreme Court held the Florida death penalty statute to be constitutional. The following are the only arguments of Petitioner which warrant comment in the opinion of this court. The Petitioner claims that the instruction on aggravating and mitigating circumstances did not require the state-to prove aggravating circumstances beyond reasonable doubt. This is simply inconsistent with the trial court's instructions which did

require proof of aggravating circumstances beyond reasonable doubt. The Petitioner also complains that the jury instructions did not tell the jury how to determine whether or not the mitigating circumstances outweighed the aggravating circumstances. The answer to this is that the statutory scheme obviously requires a value judgment from the jury and the trial judge. It is not for that reason invalid. Barclay v. Plorida, supra, Slip Op. at 10.

Next the Petitioner asserts that the trial judge's instructions could have left the jury with the impression that the burden of proving mitigating circumstances was on the Petitioner. Aside from the fact that such does not appear to be a logical conclusion from the instructions themselves, it does not make sense to talk of burdens of proof in connection with evidence of mitigating factors. This is so because no particular quality of proof is required to permit the jury to give probative effect to evidence tending to establish mitigation. The trial judge instructed the jury:

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more

mitigating circumstances and give that evidence such weight as you feel it should receive . . . (Emphasis added)

Transcript of Advisory Hearing at 57.

Finally, the contention is made that nonstatutory factors affect the imposition of the death penalty. The Petitioner asserts such factors as geography, sex of the defendant, occupation and race of the victim, as well as others may have influence on the sentencing decisions of the trial jury or trial judge, or both. This argument was rejected as a matter of law in <a href="Spenkelink v. Wainwright">Spenkelink v. Wainwright</a>, 578 F.2d 582, 613 (5th Cir. 1978), where the court held:

. . . if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness-and therefore the racial discrimination-condemned in <u>Purman</u> have been conclusively removed. Plorida has such a statute and it is being followed. The petitioner's contention under the Eighth and Pourteenth Amendments is therefore without merit.

It is obviously impossible for the legislature to devise any statutory scheme that will insure completely uniform results. Where, however, a statute has adequate safeguards against capricious imposition of the death

penalty, and the statutory procedure is followed, disparate results in similar cases are not a constitutional problem in the absence of intentional discrimination on an impermissible basis. Such is not alleged here.

#### Conclusions

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts contemplates that on initial review of the petition by the district court, the judge may summarily dismiss the petition in its entirety if the petition lacks arguable merit. The court has carefully reviewed the Amended Petition, all attachments thereto and the entire record from the state trial court. Based thereon, this court concludes the Amended Petition lacks arguable merit and should be summarily dismissed without an evidentiary hearing.

DATED at Orlando, Plorida, this 22nd day of September, 1983.



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Copies mailed to:

Richard B. Greene, Esquire Richard B. Burr, III, Esquire Assistant Public Defenders Figh Judicial Circuit of Florida 224 Datura Street - 13th Floor West Palm Beach, Florida 33401

Richard B. Martell, Esquire Assistant Attorney General 125 North Ridgewood Avenue Daytona Beach, Florida 32014

Mr. James Ernest Bitchcock Florida State Prison Box 747 Starke, Florida 32091

Clerk United States Court of Appeals for the Eleventh Circuit 56 Porsyth Street, N.W. Atlanta, Georgia 30303 1. 11 km

# CRIGINÁL

No. 85-6756

Supreme Court, U.S. F I L E D

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JOSEPH F. SPANIOL. JR.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

JAMES ERNEST BITCHCOCK,

Petitioner,

V.

LOUIE L. WAINWRIGHT, Secretary, Plorida Department of Corrections,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD Chief Assistant Public Defender

RICHARD H. BURR III Assistant Public Defender

Counsel for Petitioner

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No. 85-6756

#### IN THE

#### SUPREME COURT OF THE UNITED STATES

#### OCTOBER TERM 1985

JAMES ERNEST HITCHCOCK.

Petitioner,

VS.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

#### SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, JAMES ERNEST HITCHCOCK, pursuant to the authority of Rule 22.6, Rules of the Supreme Court of the United States, files his supplemental brief to call attention to an intervening decision not available at the time of filing his petition for writ of certiorari, in the above-styled cause.

#### DISCUSSION

Mr. Hitchcock calls attention to the Court's decision in Skipper v. South Carolina, No. 84-6859, decided April 29, 1986, as it bears upon the questions presented in Parts I and II of his petition for writ of certiorari filed April 18, 1986.

In his capital sentencing trial, Skipper had been precluded from introducing "testimony of two jailers and one 'regular visitor' to the jail to the effect that petitioner had 'made a good adjustment' during his time spent in jail." Slip opinion at 1-2. Skipper and his former wife had been permitted to testify "briefly" that

petitioner had conducted himself well during the seven-and-one-half months he spent in jail between his arrest and trial. Petitioner also testified that during a prior period of incarceration he had earned the equivalent of a high school diploma and that, if sentenced to life imprisonment rather than to death, he would behave himself in prison and would attempt to work so that he could contribute money to the support of his family.

Slip opinion at 1.

The Court found that the exclusion of the testimony of the two jailers and the regular visitor violated the Eighth Amendment mandate of individualized sentencing, despite Skipper having been permitted to present similar evidence concerning his good custodial behavior through his own testimony and that of his former wife. The Court strongly reaffirmed the Eighth Amendment principles of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) that "'"the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense..."'" and that "the sentencer may not ... be precluded from considering 'any relevant mitigating evidence.'" Slip opinion at 2-3 (quoting Eddings, 455 U.S. at 110, 114 (original emphasis)).

The <u>Skipper</u> decision supports the appropriateness of certiorari review in this case, for it makes clear the error in the ruling of the court of appeals below. First, as a general matter, <u>Skipper</u> reaffirms the Court's strong commitment to assuring that the <u>Lockett</u> and <u>Eddings</u> mandate is followed, in sharp contrast to the <u>en banc</u> majority's failure to settle the substantive and recurring Eighth Amendment question concerning the pre-<u>Lockett</u> application of Florida law. Second and more particularly to the court of appeals' reasoning, <u>Skipper</u> directly contradicts the underlying premise of the <u>en banc</u> majority's decision: that a <u>Lockett</u> violation can occur only if the excluded evidence was of a <u>different kind</u> than the evidence that had been introduced.

As discussed in detail at pages 14-18 of Mr. Hitchcock's petition for writ of certiorari, the court of appeals majority rested its rejection of Mr. Hitchcock's Eighth Amendment claim upon its conclusion that the "presentation to the jury" would not have been "appreciably different" had counsel not been con-

strained in presenting and arguing mitigating evidence by the restrictive application of the Florida statute. The majority said that the evidence excluded by that process "was developed ... to some extent for the jury." There are two flaws in the court of appeals' reasoning that are shown by <a href="Skipper">Skipper</a>. First, <a href="Skipper">Skipper</a> makes clear that <a href="Lockett">Lockett</a> error occurs by the preclusion of consideration of evidence as an independent mitigating factor and not merely by the exclusion of the evidence altogether. This is in contrast to the court of appeals' narrow construction of <a href="Lockett">Lockett</a>. Second, the <a href="Skipper">Skipper</a> decision expressly rejects the reasoning of the court of appeals below that no <a href="Lockett">Lockett</a> violation occurs unless evidence of a different kind than that presented was excluded from the sentencing process.

Skipper had presented evidence concerning his good conduct and positive accomplishments while incarcerated. Nevertheless, the Court found an Eighth Amendment violation in the exclusion of the same kind of evidence -- evidence that Skipper "has made a good adjustment" to incarceration. The Court specifically rejected the argument that the excluded testimony was "merely cumulative," slip opinion at 6, reaffirming the principle of Lockett that no relevant mitigating evidence may be precluded from consideration as an independent mitigating factor.

The eleventh circuit majority followed reasoning directly opposite to <u>Skipper</u> in rejecting Mr. Hitchcock's Eighth Amendment claim. That court said that since the excluded mitigating evidence "was developed ... to some extent for the jury," 770 F.2d at 1517-18 (emphasis supplied), there was no Eighth Amendment violation. Had the court of appeals decided <u>Skipper</u> therefore, it would have rejected the claim since the excluded evidence was developed "to some extent" for the sentencer. Just as in <u>Skipper</u>, however, the excluded evidence in the present case was highly "relevant to the sentencing determination." Slip opinion at 5-6. As detailed briefly in the certiorari petition (at pages 19-21), factors excluded from consideration as mitigating circumstances involved evidence of Mr. Hitchcock's family and social history and of his potential for rehabilitation and

likelihood of functioning well in prison, all of which "might serve 'as a basis for a sentence less than death.'" Slip opinion at 3.1 Thus, in the same manner as Skipper the authoritative application of the Florida Statute to preclude consideration of relevant mitigating factors "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Slip opinion at 7.

Accordingly, the court of appeals majority has rested its decision rejecting relief in this case upon a premise that is in direct conflict with the Court's decision in <a href="Skipper v. South Carolina">Skipper v. South Carolina</a>.

As discussed in the certiorari petition, only a few brief biographical "facts" made it into evidence before the jury, and even this data was not considered as independently mitigating since all that was possible under the restrictive application of the statute was an attempt to shoehorn that data into a statutory mitigating factor. Even so, the available evidence that was excluded from the process, as proffered by Mr. Hitchcock in the habeas proceedings, was not only more detailed in nature, but was also more credible and persuasive. For example, the proffered testimony of the psychologist as to Mr. Hitchcock's character ("oright, articulate, capable of insight") and his ability to "not only ... function well but ...[to] be a positive influence [in prison], " see certiorari petition at 21 n.21, "would quite naturally be given much greater weight by the jury." Skipper, slip opinion at 7. Thus, just as in Skipper this additional, relevant mitigating evidence presented through "more disinterested witnesses" could not be characterized as "merely cumulative." Slip opinion at 6-7.

#### CONCLUSION

For the foregoing reasons together with those set out in the petition for writ of certiorari, petitioner respectfully submits that the writ of certiorari should issue.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD & Chief Assistant Public Defender

RICHARD H. BURR III Assistant Public Defender

Counsel for Petitioner

#### CERTIFICATE OF SERVICE

I, CRAIG S. BARNARD, certify that I am a member of the Bar of this Court and that I have served a copy of the foregoing Supplemental Brief on counsel for respondent by depositing it in the United States Mail, first-class postage prepaid, addressed to RICHARD W. PROSPECT, Assistant Attorney General, Department of Legal Affairs, 4th Floor Beck's Building, 125 North Ridgewood, Daytona Beach, Florida 32014, this 6th day of May, 1986.

MAR

Counsel for Petitioner

## EDITOR'S NOTE

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No. 85-6756

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Supreme Court. U.S.
FILED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

JIM SMITH ATTORNEY GENERAL

RICHARD W. PROSPECT ASSISTANT ATTORNEY GENERAL 125 North Ridgewood Avenue Fourth Floor Daytona Beach, Florida 32014 (904) 252-1067

COUNSEL FOR RESPONDENT

#### QUESTIONS PRESENTED

WHETHER THE COURT OF APPEALS PROPERLY MEASURED THE CLAIMS AGAINST THE RECORD FACTS IN RESOLVING THE ISSUES CONCERNING THE PRESENTATION OF MITIGATING EVIDENCE AND PLEA DISCUSSIONS?

WHETHER AN EN BANC JUDGMENT OF A COURT OF APPEALS WHICH IS TOTALLY CONSISTENT WITH PRIOR PRECEDENT OF THAT COURT AND THIS COURT BUT AT ODDS WITH ONE PANEL DECISION IS SUFFICIENT REASON TO GRANT CERTIORARI REVIEW?

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IN THE

## SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1985

NO. 85-6756

JAMES ERNEST HITCHCOCK.

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

The respondent, Louie L. Wainwright, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Eleventh Circuit's judgment in this case.

#### STATEMENT OF THE CASE

On January 21, 1977, Hitchcock was found guilty of the first degree murder of Cynthia Ann Driggers. (R 166) The evidence presented at trial showed that approximately two weeks prior to the murder, Hitchcock, unemployed, ill, and with no place to live, came to Winter Garden, Florida, to stay with his brother, Richard. Hitchcock knew that coming to Florida was in violation of his Arkansas parole. (R 779)

Cynthia Ann Driggers, thirteen years old, was Richard Hitchcock's step-daughter. On the night of the murder, James Hitchcock went out with some friends, drank some beer, and smoked some marijuana. In a statement given to the police, Hitchcock

revealed that upon returning to his brother's house, he went into Cynthia's bedroom at about 2:30 a.m. (R 691) He had sex with Cynthia, and afterwards she stated that she was hurt and was going to tell her mother. Hitchcock told her that she could not, and she began hollering. Hitchcock grabbed her by the neck, and in an effort to silence her, picked her up and carried her outside to the yard. He told her that she could not tell her mother, and she began to scream. He grabbed her by the throat and began choking her, and when he released his grip, she again began to scream and cry out. Even though he hit her twice, she continued to scream: so Hitchcock choked her and "just kept chokin' and chokin'" and after she was still, he pushed her over in the bushes and went back in the house, took a shower, washed his shirt and went into his bedroom and lay down. (R 691-692) Medical evidence showed that Cynthia Ann Driggers was, before the incident, a virgin.

Hitchcock testified at trial and admitted going into Cynthia's room but stated that the sex was voluntary on her part. He stated that he was sitting on the bed putting his pants back on when his brother Richard came in, grabbed Cynthia, and pulled her out of the house. He followed and tried to prevent Richard from choking his own step-daughter. (R 765) According to James Hitchcock, he could not break his brother's grip and after a time, it was determined that Cynthia was dead. Again, according to James, he told his brother Richard to go into the house and that he would take care of the matter and then took Cynthia's body and put it in the bushes. (R 766)

After a verdict of guilty was returned, the advisory sentencing phase of the proceeding was held. At the conclusion thereof, the jury recommended that Hitchcock be sentenced to death. (R 184) The trial judge, in agreement with that recommendation, sentenced Hitchcock to death finding that the capital felony was committed while Hitchcock was engaged in the commission of sexual battery upon Cynthia Ann Driggers; that the capital felony was committed for the one purpose of avoiding being arrested for the involuntary sexual battery; and that the

capital felony was especially heinous, wicked or cruel. (R 196-197) In terms of mitigation, the trial court found that Hitchcock's age, twenty, was applicable. Weighing the aggravating factors against the sole mitigating circumstance, the trial court agreed with the recommendation of the jury and found that the recommendation was amply supported by the evidence. (R 198). Hitchcock appealed his judgment of guilt and sentence of death to the Florida Supreme Court and in his brief dated August 15, 1979, containing some fourteen separate issues, contended as a point on appeal that the decision on the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), unconstitutionally limited consideration of mitigating evidence in violation of this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978). On February 25, 1982, that court affirmed both the conviction and sentence, Hitchcock v. State, 413 So.2d 741 (Fla. 1982), finding on this particular issue, that Florida law allowed the presentation of all relevant mitigating circumstances and that the record failed to reveal that the trial judge in any way limited the defense's presentation. 413 So. 2d at 748.

Hitchcock then sought a petition for writ of certiorari from this Court raising three questions. None of these questions concerned the operation of Florida law in terms of presentation of mitigating evidence. Parenthetically, Hitchcock did raise the issue relating to the so-called agreement of life imprisonment upon a plea. The petition was denied. Hitchcock v. Florida, 459 U.S. 960 (1982).

On April 21, 1983, the Governor of Florida denied clemency and signed Hitchcock's death warrant. Hitchcock then promptly filed a motion to vacate his death sentence pursuant to Florida Rule of Criminal Procedure 3.850. As one of the grounds presented in that motion, Hitchcock argued that he received ineffective assistance of counsel due to the belief of counsel that he was restricted to presenting evidence in mitigation to that found only in Florida's statute. The motion was denied without an evidentiary hearing. On appeal, the denial was affirmed, the Florida Supreme Court finding, on this issue, that it was but the same claim, in different form, that was argued and considered on direct appeal. Hitchcock v. State, 432 So.2d 42, 43 (Fla. 1983). In a concurring opinion, Justice McDonald observed that Hitchcock's lawyer presented and argued non-statutory mitigating evidence such that a claim that counsel was in doubt as to the applicability of such evidence was belied. 432 So.2d at 44, (McDonald, concurring).

Hitchcock then sought federal habeas corpus relief in a petition raising some fifteen separate challenges to his conviction and/or sentence. After reviewing the challenges and the state trial record, the district court dismissed the petition without a hearing pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

An appeal was taken to the Eleventh Circuit Court of Appeals and that court affirmed the summary dismissal. <u>Hitchcock v. Wainwright</u>, 745 F.2d 1332 (11th Cir. 1984). A suggestion for rehearing <u>en banc</u> was filed and granted. After briefing and argument, the <u>en banc</u> court of the Eleventh Circuit affirmed the judgment of the district court. <u>Hitchcock v. Wainwright</u>, 770 F.2d 1514 (11th Cir. 1985) (en banc). Rehearing was denied. <u>Hitchcock v. Wainwright</u>, 777 F.2d 628 (11th Cir. 1985).

#### REASONS FOR NOT GRANTING THE WRIT

Hitchcock's first claim may be broken down into two propositions which, though separate, are nevertheless necessarily dependent such that examination of both is required. Hitchcock contends that the decision of the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), limited evidence of mitigating circumstances to those statutorily enumerated in

The trial court also found that Hitchcock had been previously convicted of five burglaries and was on parole at the time he committed the capital felony. However, since Ritchcock was not under a sentence of imprisonment at the time, the trial judge did not find the aggravating factor contained in section 921.141 (5)(a), Florida Statutes to be applicable. However, as noted by the Florida Supreme Court upon direct review of the conviction and sentence, the fact of parole is, under Florida law, sufficient to satisfy this aggravating factor. See, Hitchcock v. State, 413 So.2d 741 (Fla. 1982) at 747, n. 6.

Section 921.141 (6), Florida Statutes. He then builds upon this premise to contend that because of this perceived limitation, his trial counsel failed to investigate and present evidence of a non-statutory nature with the end result that he was denied an individualized capital sentencing determination.

#### STATUS OF FLORIDA LAW

An examination of the decision in Cooper v. State, supra, reveals the court's holding on this issue was a mere four paragraphs of judicial expression. Pertinent language is directed only to a claim raising alleged error surrounding the trial court's refusal, on grounds of relevance, certain testimony proffered during the penalty phase of Cooper's trial relating to his employment history, the victim's reputation for violence, and Cooper's attempt to avoid his co-perpetrator on prior occasions. The defense sought to have this testimony admitted to show that the co-perpetrator (killed during the incident) had probably fired the fatal shots, and that Cooper was not beyond rehabilitation. Importantly, while the trial court rejected these proffers of evidence, other questionably probative or relevant evidence regarding general character and reputation for truthfullness and non-violence was admitted into evidence. 336 So.2d at 1139.

In holding that the refusal to admit the proffered evidence was not error, the Florida Supreme Court predicated its judgment on its previous decision in <a href="State v. Dixon">State v. Dixon</a>, 283 So.2d 1 (Fla. 1983), stating that only evidence bearing relevance to the issues was to be admitted during this phase of a capital proceeding. Although the factors in mitigation listed in the statute were mentioned, the <a href="holding">holding</a> was nonetheless bottomed only on a notion of <a href="relevance">relevance</a>. This is precisely what was confirmed in <a href="Songer v.State">Songer v.State</a>, 365 So.2d 696 (Fla. 1978), and, more importantly, specifically reiterated in <a href="Cooper v. State">Cooper v. State</a>, 437 So.2d 1070 (Fla. 1983).

Songer, supra, contains reference to numerous decisions where non-enumerated mitigating circumstances were presented to

the sentencer and, as pointed out by the district court below, some of those decisions were published <u>prior</u> to Hitchcock's trial. The Florida Supreme Court relied upon the decisions as representing its approval of the consideration of non-statutory mitigating factors.

In Meeks v. State, 336 So. 2d 1142 (Fla. 1976), the trial court considered the "dull-normal intelligence" of the defendant and found it a mitigating fator. In Buckrem v. State, 355 So.2d 111 (Fla. 1978), and Chambers v. State, 339 So.2d 204 (Fla. 1976), the court recognized voluntary intoxication and drug use. In Hallivell v. State, 323 So. 2d 557 (Fla. 1975), the fact that the defendant was under an emotional strain over mistreatment of his girlfriend by the deceased and his status as a Vietnam veteran were mentioned. In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), the fact that the defendant was not the trigger-man was utilized as a basis to reduce the sentence to life imprisonment. In Messer v. State, 330 So.2d 137 (Fla. 1976), the court specifically held that the punishment received by a co-defendant in a separate trial was improperly excluded from the jury because it was relevant, citing to its earlier decision in Slater v. State, 316 So.2d 539 (Fla. 1975). Obviously, punishment received by a co-defendant in separate trials is not a statutorily enumerated circumstance; yet, it was found admissible because of relevancy to the ultimate issue.

Relevance is the operative word in the presentation of mitigating evidence, whether statutory or otherwise. This was recognized in Lockett v. Ohio, 438 U.S. 586 (1978). There the Court was concerned with a record in a murder trial which, as the Court seemed to emphasize, contained no evidence of guilt, and a conviction would not have been obtained but for the operation of an aiding and abetting statute. The actual killer (trigger-man) pleaded guilty and escaped the penalty of death in return for an agreement to testify against Lockett, her brother, and another perpetrator. The sole participation of Lockett in the offense was the driving of the getaway car. The prosecution offered a plea to a considerably lesser included offense and a

substantially reduced sentence three separate times.

Against this backdrop of evidence, the Court centered upon the particulars of Ohio's capital sentencing statute. Under that law, in order to avoid a mandatory death sentence upon the proving of at least one of seven specified aggravating circumstances, a capital defendant was limited to showing by a preponderance of the evidence: (1) the victim induced or facilitated the offense; (2) it was unlikely that the offense would have been committed but for the fact that the defendant was under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency.

Based on the above facts and law, the holding of this Court was that the Eighth and Fourteenth Amendments required that the sentencer not be precluded from considering as a mitigating factor, any aspect of the defendant's character and record or any evidence concerning the circumstances of the offense that the defendant proffered as a basis for a sentence less than death, provided that the evidence is relevant. As a specific refinement of this general notion, the Court stated:

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

438 U.S. at 608. Put another way, the Ohio statute was simply too restrictive in terms of relevance.

Since Florida's law was not only more expansive in its list of relevant mitigating factors but also provided for the receipt of <u>all</u> relevant evidence, the Florida Supreme Court was correct in concluding that <u>Lockett</u> did not affect the operation of our capital sentencing scheme. Florida's law was specifically mentioned as an obvious example of a non-limiting capital statute. 438 U.S. at 606, n. 15. The source of this notion is, of course, <u>Proffitt v. Florida</u>, 428 U.S. 242 (1976). Hitchcock easily ignores <u>Proffitt</u> by focusing on the six-day period elapsing between <u>Proffitt</u> and <u>Cooper</u>, thus adopting the view of

Mr. Justice BRENNAN in the dissent from the denial of a petition for writ of certiorari in <a href="Songer v. Wainwright">Songer v. Wainwright</a>, U.S. \_\_\_\_, 105 S.Ct. 817 (1985). As we understand the thrust of the contention, since <a href="Proffitt">Proffitt</a> so closely preceded <a href="Cooper">Cooper</a> was decided without knowledge of <a href="Proffitt">Proffitt</a>, and thus the Florida Supreme Court unwittingly reached an interpretation of the statute contrary to that of this Court. The implicit extension of this position is that the Florida Supreme Court, either through possible embarrassment or stubbornness, refused to mend its error and did not do so until and because <a href="Lockett">Lockett</a> was decided. In other words, <a href="Songer">Songer</a> was the Florida Supreme Court's effort to save Florida's statute in response to <a href="Lockett">Lockett</a>.

This viewpoint is both incorrect and unfair insofar as it suggests or assumes an improper motive of behalf of the Florida Supreme Court. More importantly, it overlooks the fact that the decision in <a href="Cooper">Cooper</a> was on rehearing from July 8, 1976, until September 30, 1976, an ample period within which the Florida Supreme Court could have become familiar with the "... details in <a href="Proffitt">Proffitt</a>'s footnotes ..." 105 S.Ct. 821, n.9. That the Florida Supreme Court "did nothing" between <a href="Cooper">Cooper</a> and <a href="Songer">Songer</a> is due to no other obvious reason than the fact that Songer was the first person to raise the direct constitutional challenge as a result of the decision in <a href="Lockett">Lockett</a>.

Based on the above, we submit that Florida's capital sentencing law was at no time capable of an unconstitutional application, whether before or after <a href="Cooper">Cooper</a>. Based on the preceding analysis, we do not share the view that there existed any "confusion" or "ambiguity" in Florida law. Giving Hitchcock's contention the benefit of every doubt, the very best that emerges is the <a href="possibility">possibility</a> that either the untrained or less than diligent lawyer who did nothing but read <a href="Cooper">Cooper</a>, might be confused. This possibility naturally leads to the following discussion of the issue decided by the court of appeals.

#### RESTRICTION OF MITIGATING EVIDENCE IN THIS CASE

As the court of appeals observed, a number of Florida capital

prisoners have raised the concept of restriction in mitigation in varying contexts. 770 F.2d at 1517. The court of appeals reaffirmed, en banc, that it would continue to consider the claim on a case-by-case basis, evaluating the impact of Florida law on each individual capital sentencing hearing. In the Eleventh Circuit, the court announced:

. . . that an analysis should be made in each case presented to evaluate a petitioner's claim on the particular facts of the case. A court should consider the status of Florida's law on the date of sentencing, the record of the trial and sentencing, the jury instructions requested and given, post-trial affidavits or testimony of trial counsel and other witnesses, and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing. In some cases, full and fair consideration of the claim will necessitate an evidentiary hearing. Although an evidentiary hearing on the issue is preferable, in some cases, such as the one before us, the record will be sufficient to support a decision in the absence of an evidentiary hearing." Id.

Applying the above-quoted analysis, the court of appeals determined, as did the Florida Supreme Court and the federal district court, that the record of Hitchcock's trial belied the argument that the attorney for Hitchcock believed himself to be limited. The court went on to note examples where the lawyer raised matters and intended them to be circumstances in mitigation which were not listed in the statute.

The court of appeals considered the affidavit of trial counsel. Considering it to be "carefully written", the court failed to find sufficient evidence of restrictive belief. The affidavit states only that counsel had reviewed the trial transcript in Hitchcock's case and was of the then present opinion that his perception was that the consideration of mititgating circumstances was limited to the factors enumerated in the statute. Counsel believed that his review of the transcript indicated that he was acting in accord with such a perception. While he believed that the statute limited the consideration, he did not recall when his perception changed. In fact, the contents of the affidavit were slightly misperceived by the court of appeals. Contrary to the court's understanding, counsel did not swear that he did not investigate relevant

mitigating circumstances. Rather, he swore only that he was aware of the then current status of the case in the state court and that in that court, a claim had been made that available evidence of relevant non-statutory mitigating circumstances was not investigated or presented. No where in the affidavit did counsel incorporate, ratify or otherwise adopt that allegation; he was not involved in the state court action which consisted of a motion to vacate filed subsequent to the signing of the death warrant. (Counsel's affidavit has been appended hereto at pages A 1-A 2.)

Interestingly, the decision in <u>Cooper v. State</u>, <u>supra</u>, is not even mentioned. Also, any stated belief of restriction is not alleged in the affidavits; the best counsel could provide was his stated perception of such a belief. However, that perception is rendered worthless by the direct statement that counsel had no independent recollection of whether he believed himself limited.<sup>2</sup>

In response to an issue which can and will be raised only from the State of Florida and in only the one court of appeals, the Eleventh Circuit has formulated a case-by-case approach in resolving the merits of a given claim. The formulation of that analysis has created no conflict with a decision of any other court of appeals nor with a decision of this Court. It has created no tension between the Eleventh Circuit and the Florida Supreme Court. Indeed, both tribunals have granted relief in cases in which the record demonstrated a restriction on the presentation of mitigating evidence. See, Perry v. State, 395

We have also appended the second affidavit of trial counsel (A 3 - A 6) which Hitchcock attached to his petition for rehearing en banc in an effort to persuade the court of appeals, in light of its holding, that the attorney believed himself limited. Even that affidavit did nothing to require the need for an evidentiary hearing. Though longer than the first, it was not significantly or materially different. The affidavit was still predicated on counsel's eight-year-old perception and interestingly, the final paragraph is replete with the tentative language: "may have been significantly different"; "may have developed"; "may have included evidence." Most importantly, counsel still did not swear that he did not investigate all possible areas of mitigation. Also, he did not mention Cooper v. State, supra, and he did not identify any source of perceived limitation. The second affidavit was just as carefully written as the previous one.

So.2d 170 (Fla. 1980); and after this Court's denial of certiorari in Songer, supra, the Eleventh Circuit reversed a denial of a writ of habeas corpus. Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc). Hitchcock presents this question in an effort only to quarrel with the determination of the court of appeals that the trial record did not support the claim that trial counsel was restricted in presenting any evidence in mitigation. That finding was proper and is fully supported by the record.

Indeed, practically the first thing that Hitchcock's lawyer told the jury in his summation during the advisory sentence proceeding was that they were to consider anything they felt relevant. He mentioned insight into Hitchcock's background and his upbringing for whatever purpose deemed appropriate. (A 9) After revealing Hitchcock's less than exemplary childhood, counsel mentioned the episode of inhaling gas fumes as well as the fact that Hitchcock was not a violent person in the past. Counsel reminded the jury that Hitchcock had been truthful with them by mentioning that he was on parole. (A 11) Also mentioned was the prospect of rehabilitation (A 19), and that Hitchcock, instead of running away, turned himself into the authorities. (A 20) These matters clearly have no relationship to the statutorily enumerated circumstances in mitigation. Yet, they were presented to the jury in an effort to secure a recommendation of life imprisonment. This is the record which Hitchcock ignored when making the claim that he was denied a constitutionally proper sentencing hearing because of a restricted belief of counsel. The Florida Supreme Court, the federal district court, and the court of appeals all concluded that the claim lacked factual support. To request this Court to reject those findings of fact is an insufficent basis upon which to properly receive a writ of certiorari.

#### PLEA DISCUSSIONS

The facts giving rise to this claim are only touched upon in the decision of the court of appeals and then, only in that part of the dissenting opinion in which two of the twelve judges agreed.

On February 4, 1977, the jury recommended that the death sentence be imposed. (R 184) On February 11, 1977, court convened for purposes of sentencing. At that time, counsel for Hitchcock reminded the trial court of Hitchcock's poor family background and domestic situation, his age, and his capability of rehabilitation. As a reminder, counsel also stated:

MR. TABSCOTT: "I would also remind the Court that prior to the trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence upon that plea. I have nothing further.

THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding because your client didn't want to consider any plea.

MR. TABSCOTT: That plea was offered to him by the state and the Court, however. And, it is true that he declined to enter that plea,

THE COURT: Any other matters?

MR. TABSCOTT: No, sir.

770 F.2d at 1525.

Based on that meager exchange, Hitchcock, in his initial brief filed over two years later, on August 15, 1979, raised the point on appeal that the imposition of the sentence of death after a plea agreement of life imprisonment constituted a denial of his right to trial by jury, right to remain silent, and was a denial of equal protection. (Appellant's brief on appeal, pp. 27-31) In its answer brief, the state noted the lack of factual support for the allegation that any plea agreement had ever been reached. In reply to this position, Hitchcock filed a motion seeking to supplement the record on appeal with an affidavit of Mr. Tabscott (A 22) which, rather curiously, was dated February 15, 1977, only four days after sentencing. The state objected to this improper expansion of the record on appeal, but the Florida Supreme Court, on December 20, 1979, granted Hitchcock's motion. In the face of this ruling, the state secured an

<sup>&</sup>lt;sup>3</sup>A petition for writ of certiorari filed by the state is pending in Wainwright v. Songer, Case No. 85-567.

affidavit of the prosecutor (A 23), and filed its own motion to supplement the record.

At that juncture, by virtue of Hitchcock's efforts, the Florida Supreme Court was requested to make a determination whether the sentence of death was imposed only because Hitchcock chose to exercise his right to trial by jury. That court found that the factual allegation was not supported by the record as supplemented. The court determined that there was nothing in the record which even hinted that the trial court imposed the death penalty because Hitchcock chose to have a jury trial. Despite having the affidavit of trial counsel for over two years, Hitchcock made no attempt to factually develop his claim that a plea agreement had at one time been reached.

Based on the record uncertainty, both the district court and the court of appeals proceeded on the <u>assumption</u> that there existed at one time an agreement that if Hitchcock pleaded <u>nolo contendere</u> to the crime of first degree murder, that the judge would have imposed a life sentence. While it is true that such an assumption was made, we do not believe it to be sufficiently supported, but in light of the disposition of the issue by both lower tribunals, such disagreement was unnecessary below.

The court of appeal's holding on this issue was that given the assumption upon which the court proceeded, there was nothing indicating that the sentence of death was imposed for any reason other than those expressed in the findings of fact as required by Florida law. No indication of vindictiveness was present and more importantly, the status of the case pre-trial and that after a determination of quilt and a recommendation of death obviously was not the same. As was the case in the discussion of the first question, the court of appeals did nothing more than review a record of proceedings in response to a claim which, it was determined, was not supported by that record. In so doing, the

court of appeals created no conflict nor pass upon a either a novel question nor one of such great importance that needs addressing by this Court.

#### APPLICATION OF THE DEATH PENALTY

Resolution of this issue by the panel opinion as reinstated by the en banc court was based upon settled law within the circuit as well as decisions of this Court. 745 F.2d at 1342. See also, Wainwright v. Adams, \_\_\_\_ U.S. \_\_\_, 104 S.Ct. 2183 (1984), and Henry v. Wainwright, \_\_\_\_, U.S. \_\_\_\_, 105 S.Ct. 54 (1984). In light of the consistent line of decisions of the court of appeals and the just as consistent denial of either stays of execution or petitions for writ of certiorari by this Court, one has to conclude that Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985) is at the very least, a questionable decision. Considering the fact that only one judge on the Griffin panel participated in the en banc decision in Hitchcock, and then not on this issue, it is perhaps understandable why Griffin appears to stand alone in this regard. It certainly is why Florida is seeking a writ of certiorari in that case. Wainwright v. Griffin, No. 85-801.

In any event, since the <u>en banc</u> court of the Eleventh Circuit Court of Appeals decided this issue in conformance with settled jurisprudence of that circuit and this Court, no reason exists to grant certiorari as to this issue. If anything, the decision in <u>Griffin</u>, <u>supra</u>, is that which needs further examination.

#### CONCLUSION

Despite Hitchcock's attempt to frame the issues in this case as ones requiring the need for this Court's review and judgment, the very simple fact remains that the court of appeals measured claims against a record which it determined failed to support those claims. On the mitigating evidence issue, the court of appeals determined that the district court was correct in summarily dismissing the petition on this claim since the record

<sup>&</sup>lt;sup>4</sup>Had Bitchcock desired, he always had available to him a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. See, e.g. Thompson v. State, 351 So.2d 701 (Fla. 1977).

refuted any merit. If the court did anything at all, it merely verbalized a standard which it had theretofore utilized when considering this very issue. Using the case-by-case analysis, the court of appeals had examined state court records to see if any confusion in Florida law appreciably affected a capital sentencing proceeding to see if it could be determined whether Florida law had any effect on defense counsel's decisions at the sentencing hearing. This was explained even before the en banc decision in <a href="Hitchcock">Hitchcock</a>. See, Thomas v. Wainwright, 767 F.2d 738, 745 (11th Cir. 1985). If such an appellate function is, as petitioner so strongly urges, automatically subject to certiorari review, then it is equivalent to direct appellate review and of course, that is not the case.

Even assuming that there was an agreement for a life sentence, (or even if Hitchcock believed that there was such a possibility) again, the trial record fails to support a claim that the sentence of death was imposed solely because Hitchcock chose to have a jury trial. The sentence of death was imposed based on findings of fact which were clearly proven and delineated in the state trial court. Hitchcock was not sentenced to death because of going to trial; he was sentenced because of what the evidence showed and because the trial judge agreed with the jury's recommendation.

The statistical evidence argument was properly decided below and simply because one case has unexplainably been decided differently, it insufficient reason to grant certiorari review. Indeed, less than thirty days after the denial of rehearing en banc in Griffin, supra, the court denied relief when presented with the identical claim in Thomas, supra.

For the above and foregoing, the respondent respectfully requests the Court to issue its order denying the petition for writ of certiorari.

Respectfully submitted,

Jim Smith Attorney General

(904) 252-1067

Richard W. Prospect
Assistant Attorney General
125 North Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014

COUNSEL FOR RESPONDENT

#### No. 85-6756

IN THE

#### SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

#### APPENDIX TO

RESPONDENT'S BRIEF IN OPPOSITION

JIM SMITH ATTORNEY GENERAL

RICHARD W. PROSPECT ASSISTANT ATTORNEY GENERAL 125 North Ridgewood Avenue Fourth Floor Daytona Beach, Florida 32014 (904) 252-1067

COUNSEL FOR RESPONDENT

# THE UNITED STATES DISTRIC. COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

JAMES ERNEST HITCHCOCK	
Petitioner,	
v	CIVIL ACTION NO.
LOUIE L. WAINWRIGHT, ) Secretary, Florida ) Department of Corrections, )	83-357-Civ-Orl-11
Respondent.	

#### AFFIDAVIT OF CHARLES A. TABSCOTT

STATE OF FLORIDA )
ORANGE COUNTY )

Charles A. Tabscott, being duly sworn according to law, deposes and says:

- I am an attorney duly licensed to practice my profession in the State of Florida. My office address is 46 Park Lake Street, Orlando, Florida 32803.
- 2. I am the attorney who represented JAMES ERNEST HITCHCOCK in pre-trial and trial proceedings in 1976 and 1977. My representation of Mr. Hitchcock was undertaken in the course of my employment as an assistant public defender.
- 3. I am aware of the current status of Mr. Hitchcock's case and of the claim that has been made in Rule 3.850 proceedings, and now in this proceeding, that available

evidence of relevent non-statutory mitigative circumstances was not investigated or presented in Mr. Hitchcock's sentencing trial.

- 4. I do not have an independent recollection of whether I believed the Florida death penalty statute limited consideration of mitigating circumstances to the statutory factors at the time of Mr. Hitchcock's trial. However, upon reviewing the trial transcript in Mr. Hitchcock's case, it is my opinion that during my representation of Mr. Hitchcock, my perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute. I believe that I was acting in accord with such a perception on the basis of the argument I presented in the penalty phase of his trial.
- 5. While I now know that there is no such limitation of the consideration of mitigating circumstances, I did in the past believe that the statute limited the consideration of mitigating circumstances to the statutory factors. I do not recall precisely when my perception of the requirements of Florida law changed; however, based on my current review of the case law and transcript, it appears that my perception changed subsequent to Mr. Hitchcock's trial.

CHARLES A. TABSCOTT

Subscribed and sworn to before me this lat day of the 1983.

and Kindall By comis

My Commission Expires

I C minission expires Aug 4, 1964

#### AFFIDAVIT

- I, CHARLES A. TABSCOTT, being duly sworn according to law, do hereby depose and say:
- I am an attorney duly licensed to practice law in Florida and my present office address is 696 E. Altamonte Drive, Altamonte Springs, Florida 32701.
- I am the attorney who represented James Ernest Hitchcock in his trial and sentencing proceedings in 1977.
- 3. I have previously furnished an affidavit concerning my recollection of my belief that at the time of Mr. Hitchcock's trial the presentation and consideration of mitigating circumstances under the Florida capital sentencing statute was limited to only those specifically enumerated in the statute. I reaffirm and incorporate herein my prior affidavit.
- 4. At the time of giving my prior affidavit, I was asked only to state whether I had believed at the time of Mr. Hitchcock's trial that the Florida statute limited the consideration of mitigating factors to only those in the statute. After review of the record, I responded that I had such a belief. Though I stated in my affidavit that I was "acting in accord with such a perception" at the time of Mr. Hitchcock's trial, I was not asked, and therefore did not respond, specifically whether I

would have operated differently had I not felt constrained by the statutory limit on mitigating circumstances. I have now been asked to respond to that question.

- 5. Though my independent recollection of the events surrounding my representation of Mr. Hitchcock some eight years ago is somewhat lessened by the passage of time, I have reviewed my files and the relevant portions of the trial transcript. Based upon that review I am able to relate the following:
- (a) My defense strategy in the guilt phase of Mr. Hitchcock's trial was essentially two-fold. First, I sought to show that Richard Hitchcock was a more likely person to have committed the offense. Second, I sought to demonstrate the reason why James Hitchcock would have falsely confessed to the offense in order to protect his brother and his family. With regard to Richard Hitchcock, I sought to present evidence of his violent character, but the prosecutor's objections to this evidence were sustained. I sought also to present evidence of James Hitchcock's family history to show the relationship with his brother, Richard, but the prosecutor's objections were sustained as to this evidence, and my proffer of this evidence was denied. I also tried in the guilt phase to present some evidence of James Hitchcock's family and childhood history to show why he may have tried to cover up for his brother by falsely confessing, but that evidence was excluded. The only remaining evidence that I was permitted to present were the opinions of three family members that James Hitchcock was not violent. Again this evidence was intended to demonstrate that he was less likely

- 2 -

than his brother to have committed the offense. Accordingly, I was unable to develop evidence of James Hitchcock's social and family history, despite having it available and believing it to be relevent in defense to the charge in the guilt/innocence determination.

- Mr. Hitchcock's brother in an attempt to establish the statutory mitigating circumstance concerning mental condition § 921.141(6) (b)) and thus the brief biographical facts that came out Mr. Hitchcock "sucked on gas" when he was five or six years old, his father died when he was young, and that the family did farm work were intended to give substance to the fact that Mr. Hitchcock may have been mentally affected so as to meet the statutory mitigating circumstance. This is confirmed by my argument to the jury in which I argued that the statutory mitigating circumstance concerning impaired mental condition might be found by the jury. And at the same time I mentioned the biographical facts to the jury only for "whatever purposes you deem appropriate" and not as independent mitigating evidence.
- (c) In my closing argument in the penalty phase I focused on trying to establish statutory mitigating circumstances -- age and mental impairment. Had I not perceived that the statute limited the consideration of mitigating factors, my closing argument would have been different. I would have argued to the jury that Mr. Hitchcock's family history and childhood

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years later, precisely what I would have done differently, other than my closing argument, had I not perceived the statute to be limiting. My approach to the penalty defense may have been significantly different and not limited to trying to establish and argue only statutory mitigating circumstances through brief biographical data. I may have developed my strategy toward showing Mr. Hitchcock as an individual and humanizing him before the jury. If I had not believed that the statute limited mitigation to the statute, the focus of my investigation for the penalty trial may have included evidence of mitigating factors not falling expressly within those enumerated by the statute.

The type of evidence that has since come to light concerning Mr. Hitchcock's potential for rehabilitation and the more fully developed childhood background is the type of evidence that would be consistent with such an approach. I believe today that I would present such evidence, had that evidence been available to me and had I known the legal right to do so.

CHARLES A. TABSCOTT

Subscribed and Sworn to before me

this 3 day of Geptember, 1985.

HOTARY PUBLIC POUR

My Commission Expires:

Hutary Feblic, State of Florida His Construction Expires March 13, 1989

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Court out of the hearing of the Jury and
the court reporter.)
(Whereupon the following proceedings were
had in the presence
of the Court and the
Jury:)
THE COURT: Ladies and gentle-

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men, that is all of the additional testimony that both the State and the defense wish to present insofar as aggravating and mitigating evidence is concerned.

It is now the opportunity for the Defendant to address you on this point as to what recommended sentence you will make. As I have told you just a few minutes ago, Mr. Tabscott will have the opportunity to address you first and to address you last.

Mr. Tabscott?

MR. TABSCOTT: Thank you.

Ladier and gentlemen, thank you for reconvening. I know you have all been Rose Wheeler

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very patient about this and it has been a lengthy time, some two and a half weeks, really, from the time we first started this trial.

I will try not to be very long and certainly wouldn't be nearly as long as we were during the main portion of the trial as far as closing arguments are concerned.

I am not going to go over all the testimony, and the fact that I don't go over that, I don't want you to think I don't think it is important. But, I know that you all can recall it as well as I can, if not better, and I will try to hit on some of the points that I want to highlight more or less. So, anything you feel is relevant, please do consider that and don't think that we don't think it is important.

You have learned that Mr. Hitchcock, who stands before you here today, is 20 years old. You have just learn ed a little bit about his family background in addition to some things that you have

Rose Wheeler

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learned during the main portion of the trial.

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You have learned that he was one of seven children born to parents who worked on a cotton farm. The mother and father picked cotton and hoed cotton, and did these type of things on a cotton farm. I would just like you to have a little bit of insight as to the Defendant' background and his upbringing, for whatever purposes you may deem appropriate.

You have learned that the Defendant's father died in 1963, that would make the Defendant approximately six or seven years old, at that time, when he died. You learned that the Defendant left home when he was 13 years old, which would not be unusual in a family that large, seven children, and that economic status, from Arkansas.

You have heard the Defendant say the reason he left home, at least one of the reasons was, that his mother started dating another individual that did not get along with him. The two did not get along

Rose Wheeler

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and he indicated he did not like the way
this individual treated his mother, hitting
his mother and cussing at his mother.

So, he has been pretty much on his own
since 13, the last seven years. That is
not a very long period of time, and the
Defendant is still young.

**Wage** 

You have heard Mr. Hitchcock just state today, that he sucked on gas or inhaled gas when he was five or six years old, on several different occasions, and he saw him on one occasion become unconscious. And it seemed to him, after that period of time, the Defendant's mind started to wander, and things of this nature.

Some of the other points of testimony that I would like to bring home to you, from perhaps, the previous trial, is that there was quite a bit of evidence to the effect that my client was not a violent person in the past. Richard Hitchcock and Helen Hitchcock rebutted that by saying they heard of an incident where Connie Reed, the Defendant's girl

Rose Wheeler

DEFICIAL COURT REPORTER - STH JUDICIAL CIRCUIT DRANGE COUNTY COURTHOUSE friend was hurt by t. Defendant. But,

Connie Reed herself, came forward to

testify that she was not physically harmed. There was no problem, there were no

bruises. And in fact, that she stated

at the time, that she loved him at this

point and would like to marry him, even

at this point. So, that incident was just

not that aggravated of a situation.

The Defendant's mother testified that Ernie was a good child and he minded her. She testified that she had a large family, seven children.

The Defendant, himself, there are just so many points we could go over, I'm not going to go over here because I'm sure you remember them. The Defendant, himself, on the stand, brought out the fact that he was on parole. He didn't have to do that to you, but he was being truthful with you, and he is on parole, it is true, for several crimes of burglary which all happened on one night. So, he got several different convictions. In other words, each different store or

Rose Wheeler

OFFICIAL COURT REPORTER - STH JUDICIAL CIRCUIT ORANGE COUNTY COURTHOUSE ORLANDO FLORIDA 32801 building that you would enter would be

considered a different crime and a different conviction. This is what that

Фада

situation involves.

Now, as the Judge indicated,
you are to render an advisory sentence to
him. He does not have to follow your advice, whatever your sentence is. But,
I don't want you to think your role in this
thing is not important, because it is
very important, and the Judge does consider that. Or else, there would be no
use to have this part of the proceeding.
So, it is something that he is going to
weigh, and I feel like he would weigh it
very very strongly and heavily, although
he is not legally bound, of course, to
follow it, as he has instructed you and
probably will instruct you again.

Now, there are several different aggravating circumstances and several different mitigating circumstances that the Judge is going to tell you that you are to consider in rendering your advisory verdict. And once again, your advisory

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ORANGE COUNTY COURTHOUSE
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was the verdict of guilty. Also, the aggravating circumstances have to be proved to you beyond and to the exclusion of every reasonable doubt just like the main evidence was.

The Judge is going to instruct you that these are the aggravating circumstances, and I would like to go over each one with you. That the Defendant is to be sentenced, the crime was committed while the Defendant was under sentence of imprisonment. This, we know, is not correct. There has not been any evidence of that, and I do not think there will be any evidence of that. The Defendant was not imprisoned, at that time. This, of course, goes to the situation where somebody is in prison or kills somebody while in prison or something like that.

The Defendant has previously been convicted of another capital offense or felony involving the use of violence to some person. We do not have either one of those situations. The Defendant has not

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been convicted of another capital offense, and the only conviction we have before us here today, as far as I know, only conviction that exists are convictions for burglary. And, this is not a crime of violence and I do not think there will be or has been any testimony that any violence was involved in those burglary crimes. Burglary, breaking and entering, simply entering a building and taking something out of a building. The Defendant created, when he

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committed this crime, great risk of death to many persons, like shooting in a stadium or occupied building, or something like this. We do not have that situation.

That the crime was committed to prevent the Defendant's capture or hence, his escape, or something like that; shooting a policeman when running from him, something like this. I am giving you little examples here. That, we certainly do not have.

That the crime was committed for pecuniary gain, monetary gain. We do not

Rose Wheeler OFFICIAL COURT REPORTER - STM JUDICIAL CIRCLITT ORANGE COUNTY COURTHOUSE ORLANDO FLORIDA 32301 have that situation here. No robbery involved, nothing like that. No hired killing or anything like that.

That the crime was designed to disrupt or hinder lawful exercise of governmental function or enforcement of laws. Once again, we do not have anything like that.

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That the crime was committed in the commission of several different, enumerated other felonies: robbery, et cetera. And, included therein is involuntary sexual battery. This is something that we previously argued before, whether or not it was in the commission. The Defendant did admit to you, there was a sexual intercourse in there. The crime used to be termed, rape. It is now sexual battery. Once again, I do not think we have any proof as to that. That is one of the aggravating circumstances, and that the crime was especially heinous, atrocious, or cruel. And then, the Judge will define heinous for you and you will have those definitions to review yourselves.

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thing extra. Any murder, is by nature ugly, unpleasant, bad, very negative. But, we are talking about something especially heinous and atrocious and cruel. And to my mind, we are talking about mass slayings, hired killings, things of this nature. It has to be especially so. So, get away from the point that any crime, any murder is this, because that is obviously, that wouldn't even be in there if the Judge felt and the Legislature felt that all murders were especially heinous, especially atrocious or cruel. That wouldn't even be an issue for us to talk about here today. So, it has to be something very extra.

Now, we are talking about some-

There will be then, some mitigating circumstances for you also to consider. One is, that the Defendant has no significant history of prior criminal activity. Well, I leave that up to you. You know, that he has got several burglary convictions from that one time on him. He has served time for that, and he was on

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parole for that. It is up to you whether you consider that a significant history of prior criminal activity.

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Crime for which the Defendant is to be sentenced is committed while he is under extreme mental or emotional disturbance. And, perhaps, that would go along with another one that is further down. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Both of those, the way I read them, are talking about mental capacity and things of this nature. Well, once again, I will leave this up to your discretion and decision.

There has been some testimony the Defendant, when he was five or six years old, inhaled gas and it did affect him somewhat mentally, according to James Hitchcock, the Defendant's brother.

And then, two or three others which I do not feel are relevant or applicable to this case in the mitigating Rose Wheeler

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circumstances. Victim was a participant in the Defendant's act. That one, she was obviously not a participant in the commission. However, you could consider, perhaps, that in the commission of the sexual intercourse involved. The Defendant was an accomplice in the offense and Defendant's participation was relatively minor. We do not have that situation according to your verdict.

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Of course, the Defendant did indicate that he was not the individual that committed this murder, but it was his brother. That, of course, you could consider his testimony as to that. But, you have made your decision on that, and apparently, you did not go along with that. So, for the purposes of argument, this one may not apply.

That the Defendant acted in extreme duress or in the domination of another person. Once again, the same argument would apply to that one.

And then, finally, I would like you to consider the age of the Defendant at Rose Wheeler

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DRANGE COUNTY COURTMOUSE
ORLANDO FLORIDA 32801

now; 20 years old. He is still a young man. He has a lot to live for.

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Of course, if you vote for the death penalty, and if the Judge imposes the death penalty, he has nothing else to live for. If he is to be incarcerated for life, he will be incarcerated for a minimum of 25 years. There will be no parole, no anything for 25 years. And only, at the end of 25 years do they begin to even consider thinking about him for parole. So, the Defendant would spend if he got life imprisonment, more than his own age at this time. And even if he got out, the bare minimum, it would be 25 years from now.

And, people are rehabilitated,
it does work in spite of maybe, all the
propaganda that we hear about the Florida
system. I would like to think, it is a
good system and that there is a chance for
this man, who is still young, who is
capable to eventually lead a good life.
So, this is an important factor that I would
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OFFICIAL COURT REPORTER - 8TH JUDICIAL CIRCUIT ORANGE COUNTY COURTHOUSE ORLANDO FLORIDA 32801 like you to take into consideration. That is, his age.

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The crime, as I indicated to you before, was certainly a crime of passion. It was not a crime that was thought out previously. You may have felt that there was advanced thinking about it, to the sufficiency, that it was premeditation. I am talking about sitting down and planning a crime. Certainly, none of that. Without question, it was a crime of passion, an emotional situation. The Defendant, after it was all over, went back into the house and spent the rest of the night there. Obviously, this does not indicate somebody that was thinking coolly, calmly and rationally about what had happened.

Also, I would like you to take into consideration, the Defendant did turn himself in Had ample opportunity to leave that night. I have made this point before, and I feel it is important for this part of the trial. Had all the next day to leave and probably could have

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DRANGE COUNTY COURTHOUSE

ORLANDO FLORIDA 28201

been long gone, and never here before you at this time. And, he is, because of his own doing, because he voluntarily turned himself in to the Winter Garden Police Department. So, that is all I have to say at this point.

Page

I may have a few more comments after the State Attorney will talk to you. I don't know that I will, but I may, depending upon what he says. My opportunity is to rebut him and not really offer anything new the next time I come back.

So, we ask you and urge you and pray that you will return your advisory sentence of life imprisonment as opposed to the death penalty.

Thank you.

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THE COURT: Mr. Micetich?

MR. MICETICH: Thank you, Your Honor. May it please the Court.

Ladies and gentlemen of the Jury; at this time, I have the one opportunity to talk to you. At this time, we are concerned with the phase of the trial concerning the sentence and there are two

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OFFICIAL COURT REPORTER - 9TH JUDICIAL CIRCUIT DRANGE COUNTY COURTHOUSE ORLANDO FLORIDA 32801

IN THE ' ACUIT COURT OF THE NINTH JUJICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

INFORMATION NO. CK 76-1942

JAMES E. HITCHCOCK.

Appellant,

VS.

CASE NO.

THE STATE OF FLORIDA,

Appellee.

#### AFFIDAVIT

STATE OF FLORIDA) SS:

Before me this day personally appeared Charles A. Tabscott, who, being first duly sworn, deposes and says:

- 1. That he is employed by the State of Florida, Office of the Public Defender, Ninth Judicial Circuit.
- 2. That he was the attorney assigned to handle the defense of this case.
- 3. That on the morning of January 18, 1977, before the commencement of the trial of this case, a discussion was held between the Monorable Maurice M. Paul, Judge, Circuit Court, in and for Orange County, Florida, the Assistant State Attorney Joseph P. Micetich, Jr., and the affiant, and at that time, Judge Paul indicated he would accept a plea of nolo contendere as charged and that the Appellant would be sentenced to life imprisonment.
- 4. That the Assistant State Attorney, Joseph P. Micetich, Jr., agreed to the above arrangement.
- 5. That the affiant presented this arrangement to the Appellant and the Appellant declined it and indicated that he desired a jury trial.

DATED this \_\_ day of February, 1977./

CHARLES A. TABSCOTT Affiant

SWORN to and SUBSCRIBED before at Orlando, Orange County, Florida, this \_\_ day of February, 1977.

My Commission Expires:

NOTARY PUBLIC, State of Florida

at Large

STATE OF FLORIDA,

Plaintiff.

VS.

JAMES ERNEST HITCHCOCK

#### AFFIDAVIT

On January 17, 1977 the State Of Florida, represented by the undersigned Joseph Micetich Jr., did discuss with Mr. Charles Tabscott, the attorney representing defendant JAMES ERNEST HITCHCOCK the possibility of said JAMES ERNEST HITCHCOCK entering a plea of guilty to the charge of murder in the first degree. The State Of Florida offered to recommend a life imprisonment sentence with a mandatory minimum twenty-five year sentence in return for the said defendant's plea of guilty as charged to murder in the first degree.

On January 18, 1977 this plea discussion was brought to the attention of the Honorable Maurice M. Paul, the judge who presided over the case at trial. Judge Paul indicated that he would consider the State Of Florida sentence recommendation, should the said defendant actually plead guilty as charged. At no time did said defendant ever indicate that he would plead guilty and at no time did Judge Paul ever indicate what sentence he would actually pronounce upon said defendant before the time of the actual sentencing, after trial, on February 4, 1977.

> stant State Attorne N. Orange Avenue, Suite 4:3 Orlando, Florida 32802 420-3783

Sworn to and subscribed before me this January, 1980.

My Commission expires

No. 85-6756

Supreme Court, U.S.
FILE D.
JUL 17 1988

JOSEPH F. SPANIOL, JR.

# In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST HITCHCOCK, PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

#### JOINT APPENDIX

RICHARD L. JORANDBY Public Defender

CRAIG S. BARNARD \*
Chief Assistant Public Defender

RICHARD H. BURR III Assistant Public Defender

224 Datura Street/13th Floor West Palm Beach, Florida 33401 (305) 837-2150

Counsel for Petitioner

\* Counsel of Record

JIM SMITH Attorney General

RICHARD W. PROSPECT Assistant Attorney General

SEAN DALY \*

Assistant Attorney General

125 N. Ridgewood Ave./4th Floor Daytona Beach, Florida 32014 (904) 252-1067

Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 18, 1986 CERTIORARI GRANTED JUNE 9, 1986

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## RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
May 13, 1983	FILED: Petition for Writ of Habeas Corpus
May 13, 1983	FILED: Application for Stay of Execution
May 13, 1983	FILED: Motion for Continuance pending exhaustion of state remedies
May 17, 1983	ORDER: Granting Stay of Execution
May 31, 1983	FILED: Response, Motion to Dismiss, and Motion to Compel, and Memorandum of Law In Support Thereof
June 3, 1983	FILED: Motion for Leave to Amend Petition for Writ of Habeas Corpus
June 3, 1983	FILED: Motion for Payment of Ex- penses and Leave to Take Discovery
June 3, 1983	FILED: Motion for Evidentiary Hear- ing together with supporting memoran- dum of law
June 9, 1983	ORDER: Granting Leave to Amend Petition for Writ of Habeas Corpus
June 9, 1983	FILED: Amended Petition for Writ of Habeas Corpus
June 10, 1983	FILED: Petitioner's Reply to Motion to Dismiss
June 17, 1983	HEARING: On Respondent's Motion to Dismiss, Petitioner's Motion for Pay- ment of Expenses of Witnesses, Fees, etc. and Motion for Leave to Take Dis- covery
June 17, 1983	RULING: Motion to Dismiss is taken under ADVISEMENT

DATE	PROCEEDINGS
June 17, 1983	RULING: Petitioner's Motion for Evidentiary Hearing is GRANTED
June 17, 1983	RULING: Motion to Take Discovery and for Expenses—RESERVES RUL- ING, directing petitioner to provide legal authority and proffers of testimony
June 22, 1983	ORDER: Petitioner's Request for discovery is DENIED as to taking depositions of members of the Florida Supreme Court; and as to other requests for discovery and fees petitioner is directed to furnish proffer and estimated costs
July 8, 1983	FILED: Petitioner's Supplemental Appendix in support of paragraph 19 G(2) of petition for writ of habeas corpus and Motion for Payment of Expenses, Discovery, etc.
September 22, 1983	ORDER: Dismissing Amended Petition for Writ of Habeas Corpus; together with Memorandum of Decision
October 3, 1983	FILED: Notice of Appeal
October 3, 1983	ORDER: Application for Certificate of Probable Cause GRANTED
February 10, 1984	FILED: Brief for Petitioner-Appellant
March 9, 1984	FILED: Brief for Respondent-Appelled
March 26, 1984	ORAL ARGUMENT
October 18, 1984	OPINION: Affirming the denial of habeas corpus relief
November 7, 1984	FILED: Suggestion for Rehearing En
January 8, 1985	ORDER: Granting Rehearing En Band

DATE	PROCEEDINGS
February 7, 1985	FILED: Supplemental Brief for Petitioner-Appellant
March 6, 1985	FILED: Supplemental Brief for Respondent-Appellee
March 19, 1985	FILED: Petitioner-Appellant's Motion to Strike Appendix to Appellee's Brief and Portions of the Brief Referring Thereto
May 9, 1985	ORDER: Granting Motion to Strike Appendix to Brief of Appellee
June 10, 1985	ORAL ARGUMENT: En Banc
August 28, 1985	OPINION of the En Banc Court affirm- ing the denial of habeas corpus relief
September 16, 1985	FILED: Petition for Rehearing
November 19, 1985	OPINION: denying Rehearing
February 6, 1986	ORDER: by Justice Powell extending the time within which to file a petition for Writ of Certiorari until April 18, 1986
April 18, 1986	FILED: Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit
May 14, 1986	FILED: Brief in Opposition to Peti- tion for Writ of Certiorari
June 9, 1986	ORDER: Granting Petition for Writ of Certiorari limited to Questions I, II and IV presented by the Petition, and grant- ing leave to proceed in forma pauperis

### IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

Civil Action No. 83-357-ORL-CIV-11

JAMES ERNEST HITCHCOCK, PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, RESPONDENT

#### AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY PERSON IN STATE CUSTODY

To the Honorable John A. Reed, Jr., Judge of the United States District Court for the Middle District of Florida, Orlando Division:

- 1. The Circuit Court of the Ninth Judicial Circuit in and for Orange County, entered the judgment of conviction and sentence under attack. That court is located in Orlando, Florida.
- 2. Petitioner entered a plea of not guilty, and a judgment of conviction was thereafter entered on January 21, 1977 (T. 998). An advisory sentence of death was returned on February 4, 1977 (TAS. 63), and the trial judge imposed death on February 11, 1977 (TS. 7-8).
- 3. Petitioner was sentenced to death by electrocution (TS. 7-8).

- 4. Petitioner was indicted for first degree murder of Cynthia Ann Driggers (R. 1).
  - 5. Petitioner entered a plea of not guilty.
- 6. Petitioner's guilt-innocence trial was before a jury and his sentencing trial included an advisory jury.
  - 7. Petitioner testified at his guilt-innocence trial.
  - 8. Petitioner appealed his conviction and sentence.
- 9. Petitioner's conviction and sentence were affirmed by the Florida Supreme Court, and rehearing was denied, on May 17, 1982. *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982).
- 10. In addition to the above-mentioned direct appeal, petitioner has filed three petitions with respect to his judgment of conviction and sentence in other courts, and has been an applicant in executive elemency proceedings.
- 11. (a) Petitioner filed, in the Supreme Court of the United States, a petition for writ of certiorari to the Supreme Court of Florida on direct appeal. Certiorari was denied on October 18, 1982. *Hitchcock v. Florida*, U.S. —, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982).
- (b) During the pendency of his direct appeal to the Supreme Court of Florida, petitioner joined 122 other death-sentenced persons in an original habeas corpus proceeding in the Supreme Court of Florida challenging that court's practice of reviewing ex parte, non-record information concerning petitioner's and other capital appellants' mental health status and personal backgrounds. The Supreme Court of Florida denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the Supreme Court of the United States declined to review that decision by writ of certiorari, Brown v. Wainwright, 454 U.S. 1000 (1981).
- (c) On February 22, 1983, petitioner appeared before the Board of Executive Clemency. On April 21, 1983, the Governor denied clemency and signed a death warrant effective from noon on May 13, 1983 to noon on May 20, 1983. Petitioner's execution was scheduled for Wednesday, May 18, 1983 at 7:00 A.M.

<sup>&</sup>lt;sup>1</sup> In referring to the trial and appellate record, petitioner will use the following abbreviations: "T" (guilt-innocence trial transcript), "TAS" (penalty trial transcript), "TS" (sentence-imposition proceeding transcript), and "R" (record on appeal).

(d) Cn Tuesday, May 3, 1983, petitioner filed a Motion to Vacate Judgment and Sentence, pursuant to Fla. R.Crim.P. 3.850, in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County [the trial court]. In connection with this motion, petitioner also filed pleadings seeking a stay of execution, as well as discovery, fees and expenses of expert witnesses, and expenses of lay witnesses in connection with an evidentiary hearing on petitioner's Rule 3.850 motion. On May 10, 1983, the circuit court denied the application for a stay of execution and denied the motion to vacate, without an evidentiary hearing. Thereafter, on May 17, 1983, the Florida Supreme Court affirmed the denial of the motion to vacate and refused to entertain a motion for rehearing with respect to its decision.

#### STATEMENT OF THE FACTS

12. This case involves the death of thirteen-year old Cynthia Ann Driggers on July 31, 1976, in Winter Garden, Florida. Ms. Driggers' body was found in a shaded area behind her family's home between 3:00 and 3:30 P.M. on July 31, 1976 (T. 299). She had gone to bed at approximately the same time as the rest of her family the night before (T. 276), but when her mother had awakened at 6:00 A.M. on July 31, Ms. Driggers was not in her room (T. 251-252). She was not again seen until her body was discovered by her stepfather between 3:00 and 3:30 that afternoon. An autopsy revealed that the cause of death was asphyxiation as a result of strangulation (T. 496). The only other injuries revealed in the autopsy were facial lacerations and bruises in the vicinity of Ms. Driggers' eyes, apparently caused by a blunt object such as a fist (T. 499-501).2

Finally, the autopsy revealed the presence of sperm in Ms. Driggers' vaginal cavity (T. 509).

13. The guilt-innocence phase of the trial centered upon whether Ernie Hitchcock (the petitioner) or his brother (also Ms. Driggers' stepfather), Richard, had committed the homicide. The state attempted to prove that Ernie had committed the homicide through the introduction of his confession. In his confession to the police on August 4, 1976—which was given at a time when, according to a psychiatrist appointed to evaluate Ernie's sanity and competence, Ernie was suffering a "moderately severe depression" (R. 27)—Ernie admitted killing Ms. Driggers. He said that he returned to the Hitchcock's home (where he had been temporarily living as well) at approximately 2:30 A.M. on July 31, 1976, entered the house through a dining room window, and went to Ms. Driggers' bedroom. (T. 691) He and Ms. Driggers had sex, after which she said she had been hurt and was going to tell her mother. (T. 691) He told her she couldn't but she persisted, and when he tried to stop her from leaving the room, she began to scream. (T. 691) He then covered her mouth, picked her up, and took her outside, where she still said she would tell her mother and again started to scream. (T. 691) He then started choking her and hit her several times and then continued choking her without knowing what was happening. (T. 692) When he realized that she was dead, he carried her body to some nearby bushes. (T. 692)

14. In the defense case at trial, Ernie Hitchcock testified and repudiated much of this confession. He explained that he had given a false confession because he was deeply depressed, and because he wanted to cover up his brother Richard's role in killing Ms. Driggers. (T. 772-773, 777) Richard had been like a father to him, and he wanted to be sure Richard stayed with his family. (T. 777) However, after he had given the false confession, his mother and sister came to see him frequently, restoring some hope for his life, and he decided to tell the truth

<sup>&</sup>lt;sup>2</sup> The medical examiner also testified that Ms. Driggers' hymen had been lacerated (T. 507-508), but further indicated that this was a normal occurrence for a young woman engaging in her initial experience of sexual intercourse (T. 518).

about the homicide. (T. 776-777) The truth was, he testified, the following. On the night of the homicide he was at home until about 10:30 P.M. (T. 757) He returned home about 2:30 A.M. after drinking beer heavily and smoking some marijuana. (T. 760-763) After he came home, he and Cynthia had consensual sexual relations, but were discovered by Richard. (T. 762-763) He then saw Richard take Cynthia out of the house and choke her. (T. 765) Ernie finally kicked Richard off her (T. 765), but she was already dead. (T. 766) Richard cried and asked Ernie what he could do. (T. 766) He then helped Richard hide the body (T. 766), and thereafter, went to the dining room window and pushed the screen off to make it look like some one had broken in. (T. 767) Ernie denied sexually assaulting Ms. Driggers (T. 783), and indeed in its case, the state presented no evidence that any violence or force had been exerted against Ms. Driggers prior to or during the sexual intercourse.3

15. At the close of the guilt-innocence trial, the jury was charged on both premeditated and felony murder in connection with murder in the first degree (T. 965-969). The felony underlying the felony murder theory was "involuntary sexual battery," (T. 998), and was defined in the instructions as follows:

"It is a crime to commit sexual battery upon a person over the age of 11 years without that person's consent, and in the process use actual physical force likely to cause serious physical injury."

(T. 968) Despite instruction on both theories of first degree murder, however, the jury returned only a general verdict of "guilty of Murder in the First Degree." (T. 998)

16. In the sentencing trial which followed thereafter, the State presented no additional testimony (TAS. 6), and the defense presented only one witness, James Harold Hitchcock, another brother of the defendant. Mr. Hitchcock testified that Ernie had a habit of "sucking on gas" from automobiles when he was five or six years old, which caused him to "pass out" once; after that his "mind wandered." (TAS. 7-8) Mr. Hitchcock further testified that Ernie had come from a family with seven children, which earned its livelihood by hoeing and picking cotton. (TAS. 9-10) Their father had died of cancer after having been bedridden for eight months. (TAS. 8-9) Finally Mr. Hitchcock testified that Ernie had been close to his (James Harold's) children and had cared for them as a sitter. (TAS. 10)

17. Thereafter, the jury recommended that the judge impose a death sentence (TAS. 63), and he did (TS. 7-8). In support of the sentence, the judge entered findings of fact in which he found three aggravating circumstances <sup>5</sup> and one mitigating circumstance. <sup>6</sup>

<sup>&</sup>lt;sup>3</sup> Except for the confession, the remainder of the state's case had gone to prove that Ernie Hitchcock had engaged in sex with Ms. Driggers and that her blood was on his pants. Neither of these facts was disputed, however, for Mr. Hitchcock conceded that he had engaged in sex with the victim and that he had gotten her blood on his pants in moving her body after Richard had killed her (T. 787).

<sup>&</sup>lt;sup>4</sup> At the close of the state's case, the defense had moved for a judgment of acquittal, claiming insufficiency of the evidence to show either premeditation or felony murder (T. 711-712). The trial judge denied the motion as to premeditation but reserved ruling "until the close of all the testimony by both sides," as to felony murder (T. 712). At the close of the evidence, the judge denied the motion as to felony murder as well (T. 841).

<sup>&</sup>lt;sup>5</sup> "The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery....[T]he defendant killed Cynthia Ann Driggers for one purpose only, to avoid being arrested after commission of the involuntary sexual battery.... The murder was especially heinous, wicked, or cruel." (R. 196-197)

<sup>&</sup>lt;sup>6</sup> "At the time of the murder, defendant was 20 years of age. [This] [c]ircumstance . . . is applicable." (R. 197)

#### GROUNDS FOR HABEAS CORPUS RELIEF

## Grounds for Relief From the Sentence

19. The petitioner's death sentence was obtained in violation of his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, for each of the reasons more fully set forth below.

B. Petitioner's death sentence was imposed in proceedings which precluded, by operation of law, the consideration of relevant mitigating circumstances, in violation of the Eighth Amendment requirement that there be no bar to the presentation and consideration of relevant mitigating evidence.

(1) The trial judge refused as a matter of law to consider numerous mitigating circumstances, in direct violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

- (a) The judge refused to consider as mitigating, uncontroverted credible evidence that petitioner suffered from mental and emotional problems which influenced his behavior at the time of the homicide.
- (i) The evidence of relevant mental and emotional problems consisted of the following:
- (aa) Petitioner's brother testified that when petitioner was young, he had a habit of inhaling gas from the gas tanks of automobiles (TAS. 7-8). He stated that he had seen petitioner pass out from this activity (TAS. 8), and that this affected petitioner's mind by making it wander (TAS. 8).
- (bb) This early damage to petitioner's mind was compounded by his problems later in life. Petitioner's father died of cancer when he was six or seven (R. 194) His mother then had to work and take care of a family with several children (T. 775) Petitioner thereafter had continuing problems with his stepfather, who was always

cursing his mother and occasionally hit her (T. 773). Because of this, petitioner left home at thirteen and was on his own, drifting from place to place, thereafter (R. 194, T. 773).

(cc) On the night of the homicide, petitioner's mental and emotional vulnerabilities combined with an extremely stressful situation to create a set of circumstances he could not handle. Petitioner had consumed a large amount of marijuana (two cigarettes) and a large quantity of alcohol (two six packs of beer) before returning home that night. While suffering from various vulnerabilities to mental and emotional disturbance and while highly intoxicated, he was then faced with a pressure-packed situation. According to petitioner's "confession" he and the decedent engaged in sexual relations, and then she threatened to tell her mother (T. 691). Petitioner then completely lost control and did not know what to do and didn't know what happened. (T. 691).

(ii) The judge refused to consider these facts as mitigating, because he found the facts insufficient to establish the mitigating circumstances in the death penalty statute which were concerned with mental or emotional disturbance or duress or with impaired mental capacity. (R. 197) See Fla. Stat. § 921.141(6)(b), (e), (f).

(b) The judge also refused to consider as mitigating the following facts in evidence or inferences from facts in evidence: (i) petitioner's voluntary presentation of himself to the police (T. 726-727) at a time when he had an unrestricted opportunity to flee; (ii) petitioner's non-violent character and background, demonstrated by his lack of any violent criminal history (T. 790-791) and by his reputation for not resorting to violence (T. 733, 737, 739, 744, 747, 749); (iii) doubt about whether petitioner actually intended to kill the decedent, demonstrated as a matter of law by the judge's submission of the case to the jury on the felony murder theory as well as on the premeditated murder theory, and demonstrated as a matter of fact by petitioner's wholly irrational, out-

of-control mental and emotional state at the time of the homicide [see ¶ 19B (1)(a)(i), supra]; (iv) doubt, which was less than reasonable doubt, about guilt, demonstrated by petitioner's unwavering trial testimony denying the commission of the homicide; and (v) the prior offer of a plea of nolo contendere and life imprisonment by the state, with the court's approval (TS. 5-6). The judge clearly refused to consider these mitigating factors, for he made absolutely no mention of them—despite there having been established by the evidence—in his findings of fact in support of the death sentence (R. 194-198).

- (c) The judge refused to consider the mitigating factors in ¶ 19B (1) (a) and (b), supra—even though they were all relevant to petitioner's character and record or to the circumstances of the offense and were thus "relevant" mitigating circumstances under the Eighth Amendment, see Lockett v. Ohio, 438 U.S. 586, 604-605 (1978)—because he believed that the only factors he could consider in mitigation were those listed in sub-section (6) of the Florida death penalty statute, Fla. Stat. § 921.141. This is demonstrated by the following statements in the judge's sentencing order and findings of fact in support thereof:
- (i) The sentencing order reflects that the judge considered only statutorily-enumerated mitigating circumstances in concluding to impose death:

"[a]fter weighing the aggravating and mitigating circumstances, this Court finds that sufficient aggravating circumstances exist as enumerated in Fla. Stat. 921.141 (5) to require imposition of the death penalty, and there are insufficient mitigating circumstances as enumerated in Fla. Stat. 921.141 (6), to outweigh the aggravating circumstances."

## (R. 192) (emphasis supplied).

(ii) The findings of fact reflect the same limitation in the consideration of mitigating circumstances.

"In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances."

- (R. 195) Immediately after this statement, the judge evaluated the statutory aggravating circumstances and only the mitigating circumstances enumerated in the statute (R. 195-197). He made no mention of other mitigating factors established by the record, because these factors did not establish any of the statutory mitigating circumstances. As a matter of state law, such findings, confined only to a discussion of the statutory mitigating circumstances in evidence, demonstrate that nonstatutory mitigating circumstances were not considered. See Moody v. State, 418 So.2d 989, 995 (Fla. 1982).
- (2) The trial judge's instructions to the jury likewise reflected his view that the death penalty statute limited the consideration of mitigating circumstances to those enumerated in the statute. Accordingly, the jury's consideration of mitigating circumstances was similarly restricted in violation of Lockett v. Ohio supra, and Eddings v. Oklahoma, supra. These instructions, which could have been construed by a reasonable juror to exclude any consideration of nonstatutory mitigating circumstances were the following:
- (a) In his pre-penalty-trial charge to the jury, the judge instructed the jurors that after the close of evidence and argument by counsel, "I will then instruct you on the factors in aggravation and mitigation that you may consider under our law." (TAS 5)
- (b) At the end of the trial, the trial judge instructed the jury that "[t]he aggravating circumstances which you may consider shall be limited to the following: [whereupon the eight statutory aggravating circumstances were read]." (TAS 54) Thereafter, in strikingly parallel words, the trial judge instructed the jury that "[t]he mitigating circumstances which you may consider shall be

the following: [whereupon the seven statutory mitigating circumstances were read]." (TAS. 56)

- (c) At no time in his instructions to the jury did the trial judge inform the jury that they could consider any mitigating circumstances supported by the evidence in addition to the statutory mitigating circumstances specified in the instructions.
- (d) Because of the repeated parallel references to "the aggravating and mitigating circumstances and the parallel language limiting consideration of aggravating and mitigating circumstances to enumerated circumstances, these instructions could well have led a reasonable juror to believe that he or she could not consider the mitigating circumstances which were in evidence but were unrelated to the seven enumerated mitigating circumstances.<sup>8</sup>
- (e) Petitioner was severely prejudiced by the exclusion of nonstatutory mitigating circumstances from the consideration of the jury, for much of the mitigating evidence he presented fell into the category of nonstatutory mitigating circumstances. See ¶ 19B (1) (a) and (b), supra.
- (3) The trial judge excluded evidence of a relevant mitigating factor, and the Florida Supreme Court approved the exclusion of that evidence as a matter of law, in violation of *Lockett v. Ohio*, supra.
- (a) Petitioner's theory of defense was that his brother, Ricahrd Hitchcock, had killed Cynthia Ann Driggers after Richard discovered petitioner's and Ms. Driggers' sexual liaison during the night of July 31, 1976 (T. 760-792).
- (b) To corroborate his own eyewitness testimony that this is what occurred, petitioner sought to prove three additional matters, including his brother Richard's repu-

tation for being violent. See ¶ 18C, supra. This evidence was excluded, however. (T. 737, 739-741, 744, 745).

(c) The Florida Supreme Court held the evidence tendered in support of these matters was properly excluded, because the propositions themselves were irrelevant to whether the petitioner or Richard committed the murder, or to any other material issue in the case. Hitchcock v. State, supra, 413 So.2d at 744.

(d) Petitioner submits that these propositions indisputably tended to establish the relevant mitigating circumstance concerning doubt (less than "reasonable

doubt") about guilt. See ¶ 18C (4), supra.

- (e) The Supreme Court's approval of the exclusion of this evidence with respect to sentencing issues, as well as guilt issues, Hitchcock v. State, supra, was not only constitutionally erroneous for approving the exclusion of relevant mitigating evidence, however. It was also erroneous because it was based in part upon the notion that, in any event, the evidence related to a nonstatutory mitigating factor (doubt about guilt) which was excluded from consideration by exclusion from the statutory list of mitigating circumstances. See Cooper v. State, 336, So.2d 1133, 1139 (Fla. 1976) (approving the exclusion of similar evidence because, in part, it related to a non-statutory mitigating circumstance).
- (4) The available evidence of relevant nonstatutory mitigating circumstances was not investigated or presented in petitioner's sentencing trial, because of defense counsel's belief that the Florida death penalty statute limited the sentencer's consideration of mitigating circumstances to those enumerated in the statute. Under these circumstances, Mr. Hitchcock was deprived of a sentencing proceeding which satisfied Eight Amendment requirements, either by ineffective assistance of counsel or by operation of the Florida death penalty statute, or by both.
- (a) The Eighth Amendment indisputably prohibits any statutory, or any other "operation-of-law" exclusion of

<sup>8</sup> Moreover, the argument of the prosecutor treating the consideration of aggravating and mitigating circumstances as equally limited (TAS. 27-44) only served to reinforce such a reasonable view.

relevant mitigating evidence from the consideration of the sentencer in a capital sentencing trial. Lockett v. Ohio, supra; Eddings v. Oklahoma, supra. "Relevant" mitigating evidence, which cannot constitutionally be excluded, encompasses any evidence pertaining to the defendant's character and record and to the circumstances of the offense. Lockett v. Ohio, supra.

- (b) This well-settled principle of constitutional law was violated in Mr. Hitchcock's case, however, either because at the time of his trial the Florida death penalty statute prohibited the introduction and consideration of nonstatutory mitigating evidence, or because his trial counsel ineffectively believed that the law operated in such a manner at the time of his trial. In any event, trial counsel, Charles A. Tabscott, believed that the Florida death penalty statute flatly prohibited the introduction and consideration of nonstatutory mitigating circumstances.
- (c) At the time of Mr. Hitchcock's trial in January and February, 1977, the state of the law with regard to this matter was the following:
- (i) Since the revision of the Florida death penalty statute effective on December 8, 1972, the statute included the following delimiting language concerning the aggravating and mitigating circumstances which could be considered by the jury and judge in determining the sentence in a capital trial:

"Aggravating circumstances shall be limited to the following: . . ." Florida Statutes, § 921.141 (5).

- "Mitigating circumstances shall be the following: ...." Florida Statutes § 921.141 (6).
- (ii) In the first case to interpret the death penalty statute, State v. Dixon, 283 So.2d 1 (Fla. 1973), the Florida Supreme Court implied that the consideration of mitigating circumstances was limited in the same manner as the consideration of aggravating circumstances, by referring frequently to "the" mitigating circumstances

and including in such reference only the statutorily enumerated circumstances. Justice Ervin in dissent stated explicitly that there was such a limitation in an effort to comply with Furman v. Georgia, 408 U.S. 238 (1972). State v. Dixon, supra, 283 So.2d at 17.

(iii) There was no further judicial guidance concerning this matter until July, 1976, at which time the Supreme Court of the United States and the Supreme Court of Florida reached opposite conclusions with respect to this provision of the Florida statute. In Proffitt v. Florida, 428 U.S. 242 (1976), "six members of [the United States Supreme] Court assumed in approving the statute, that the range of mitigating factors listed in the statute was not exclusive." Lockett v. Ohio, supra, 438 U.S. at 606. Just six days thereafter, however, in Cooper v. State, 336 So.2d 1133 (Fla. 1976), the Florida Supreme Court held that "the range of mitigating factors listed in the statute," Lockett, supra, was exclusive:

"The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding . . . The Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty . . . ."

## 336 So.2d at 1139. See also id. at 1139 n. 7.

(iv) Just six months after the decisions in *Proffitt* and *Cooper*—and without further guidance from either the Florida Supreme Court or the United States Supreme Court—Mr. Tabscott proceeded to trial on behalf of Mr. Hitchcock. *Lockett v. Ohio, supra,* the case which would definitively prohibit an exclusive statutory list of mitigating circumstances from limiting the consideration of relevant mitigating circumstances, would not be decided for another year and one half.

- (d) With the law in this state, Mr. Tabscott believed that he could not present evidence unrelated to the statutory mitigating circumstances. Accordingly, he did not investigate the availability of such evidence on behalf of Mr. Hitchcock.
- (e) Had such an investigation been undertaken, Mr. Tabscott would have discovered at least the following evidence of nonstatutory mitigating factors:
- (i) Psychological testing and evaluation of Mr. Hitchcock would have supported the mitigating factor of uncertainty about guilt-lingering, genuine doubt about guilt which may not rise to reasonable doubt but which can, nonetheless, be a critical factor in mitigation. See Green v. Georgia, 442 U.S. 95 (1979); Smith v. Balkcom, 660 F.2d 573, 580-581 (5th Cir. 1981) (Unit B). Psychological evaluation would have shown that when faced with stressful situations, throughout his life beginning with his early childhood, Mr. Hitchcock's pattern of coping was to retreat and escape. Such a strongly entrenched coping mechanism would likely have pushed him to run, upon his sexual experience with Ms. Driggers becoming stressful (either by her threat to tell her mother or by Richard's discovery of what was going on). To turn upon Ms. Driggers instead and to kill her would have been totally incongruent with his lifelong pattern of behavior. [Testimony available from Dr. Elizabeth A. McMahon, clinical psychologist]. Thus, Mr. Hitchcock's psychological history and profile would have corroborated any lingering doubt about his guilt.
- (ii) Testimony concerning the extraordinary hardships of Mr. Hitchcock's childhood and teenage years and the character traits he developed during these years, coupled with psychological evaluation concerning his strong capacity for living a lawful, productive life despite such horrible beginnings, would have supported the mitigating factor of Mr. Hitchcock's excellent potential for rehabilitation. See Simmons v. State, 419 So.2d 316, 320 (Fla. 1982).

(aa) Mr. Hitchcock's childhood and teenage years were a nightmarish reality of poverty, grief, emotional neglect, and uprootedness. Mr. Hitchcock was a member of a nine-person family whose only source of income was derived from the four-to-five month long cotton season in Arkansas, during which as many of the family members worked in the cotton fields as possible. When Mr. Hitchcock was seven years old, his father died of cancer, and the family's meager income was diminished significantly without his labor. During the seven or eight months when cotton was out of season, the family's sole source of income after his death was the children's \$75.00 per month social security survivors' income. During all of his formative years, Mr. Hitchcock's family lived in farm tenant housing which was very small and without indoor plumbing. Food was frequently in scarce supply, and only occasional rabbits and the federal surplus commodity food program kept the family from starvation. Most of the children in Mr. Hitchcock's family wore clothing made from flour sacks. The death of Mr. Hitchcock's father brought other misery as well. Mr. Hitchcock had loved his father deeply, and he had a more difficult time rebounding from the loss of his father than did the other children. The father had also played the critical role of keeping the family together and building the love relationships within the family, and with his death the family literally disintegrated. Ernie had a growing feeling that he no longer belonged and when his mother remarried five years after his father's death (when Ernie was 12 years old), he stayed only one more year. During that year, he saw his stepfather become an acute alcoholic and witnessed an increasing barrage of physical and emotional abuse heaped upon his mother by his stepfather. Finally, at 13, he left. He became a thirteen year old adult, drifting from relative to relative, unable to sink roots or experience the feeling of being welcome anywhere. The meager home he had known has squeezed him out, and no one took him in. [Testimony available from

Deputy Sheriff Lee Baker, Mississippi County, Arkansas; Lorine Galloway (Mr. Hitchcock's mother); Betty Augustine (Mr. Hitchcock's sister); James Harold Hitchcock (Mr. Hitchcock's brother); Martha Galloway (Mr. Hitchcock's sister); Carroll Galloway (Mr. Hitchcock's brotherin-law); and Brenda Reed (Mr. Hitchcock's sister).]

(bb) Despite the harshest of the environments in which a child could grow into adolescence, Ernie Hitchcock developed and never lost solid character traits which all who knew him witnessed and admired. He always worked hard without complaining, often working ten hour days in the cotton fields well before his tenth birthday. He tried to pick up odd jobs to earn extra money, which he then shared with his family and with siblings' families. He got along well with other children. He was respectful toward adults. He tried his best to help his mother with daily chores after his father died. He helped other family members, once spending nearly six weeks in the household of his brother James Harold, performing household and child care duties while James' wife Fay recuperated from surgery. He saved his uncle, Charles Hitchcock, from drowning. While he worked as a fruit pricker in Florida, he was always willing to help others fill their bins after his was full. He was a person who won the respect and affection of others because of who he was. [Testimony available from the persons listed in ¶ 19 B (4) (e) (ii) (aa), supra, as well as from G. E. Motley, cotton farm supervisor, and Charles Hitchcock (uncle).]

(cc) These traits, strengthened by surviving despite the harshness of Mr. Hitchcock's environment, made Ernie Hitchcock an excellent candidate for rehabilitation, as psychologist Elizabeth McMahon determined in connection with Mr. Hitchcock's clemency application, on February 14, 1983:

"James does not, in many respects, fit the more typical picture of those who commit violent acts against other individuals. His family, although very poor,

was not physically abusive and the emotional neglect he experienced was more a function of ignorance and the circumstance than a function of intent. He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression. His history is less one of antisocial behavior than it is one of a marginal lifestyle of 'getting by' and staying 'uninvolved' with others due to his own anxiety and fear of rejection. Even that level of anxiety and concern about the opinions and feelings or others is atypical of this population.

If James' sentence were commuted and he were to be in 'population', there is every reason to believe that not only would he function well but he would be a positive influence. He has the ability to act in the role of an arbitrator and could probably assist in defusing situations that arise between inmates and staff and/or among inmates. Also, he is bright and has comprehended and retained considerable information from reading and from watching educational television. He would be able to handle any assignment such as the library, legal aide, etc. well.

Should this occur, James should also have the opportunity of being involved in individual psychotherapy. Again, he is bright, articulate, capable of insight—all characteristics which make one a good candidate for traditional psychotherapy. Although he has gained much on his own, he now needs competent assistance to help him confront and deal with those aspects of his personality that are most scarey and anxiety-provoking for him—the issues of affection and dependency that he is most likely to avoid facing—and help him to integrate and consolidate the progress he has already made."

Dr. McMahon's evaluation would have been available in 1977 as well as in 1983 had Mr. Tabscott sought it, for

the traits observed by Dr. McMahon have been a part of Mr. Hitchcock all of his life.

(5) Petitioner suffered prejudice sufficient to require his death sentence to be vacated as a result of the non-investigation, non-presentation, exclusion (from evidence), and non-consideration of relevant mitigating factors, described in ¶¶ 19 B (1)-(4), supra.

(a) The mitigating factors described in the preceding paragraphs were "relevant" mitigating factors under

Lockett v. Ohio, supra.

- (b) Eddings v. Oklahoma, supra, requires the state courts "to consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." 455 U.S. at 117. No further showing of prejudice—than the showing that the state courts did not consider "all relevant mitigating evidence"—is necessary to require a death sentence to be set aside. Id.
- (c) Pursuant to *Eddings* and *Lockett*, therefore, the failure of the sentencer to consider the relevant mitigating factors alleged herein, for the reasons alleged herein, requires the death sentence to be vacated.
- E. The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case vitiated the court's unique responsibilities in the review of capital prosecutions.
- (1) The review conducted by the Florida Supreme Court in petitioner's case did not meet the constitutional requirements for appellate review enunciated in *Proffitt* v. Florida, 428 U.S. 242 (1976).
- (a) In upholding the constitutionality of Florida's capital sentencing scheme, the United States Supreme Court relied upon the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case." *Id.* at 251. The appeal procedure was thus seen as an integral part of the

task of a capital sentencing scheme: to remove arbitrariness from the imposition of the death sentence. In the Supreme Court's view, review by the Florida Supreme Court served as a final check against the arbitrary imposition of death sentences, for it was a system "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted." Id. at 253.

(b) The United States Supreme Court believed that the Florida Supreme Court would undertake "responsibly to perform its function of death sentence review with a maximum of rationality and consistency." Id. at 258. And that each case would be "conscientiously reviewed . . . to assure consistency, fairness, and rationality in the evenhanded operation of state law." Id. at 259-60. Upon this basis, Florida's form of review was thus deemed to be equivalent to the "specific form of review" provided by the Georgia statute and, accordingly, was of crucial importance to the constitutionality of Florida's capital sentencing scheme. Absent this independent, conscientious, and reliable method of review, the Florida capital sentencing statute would be subject to the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972).

(c) In Mr. Hitchcock's case, the Florida Supreme Court failed to undertake the "conscientious review" necessary to assure "consistency, fairness, and rationality" between Mr. Hitchcock's case and other death penalty cases.

(i) The Florida Supreme Court failed to review the aggravating circumstances found in Mr. Hitchcock's case to be certain that these circumstances were applied in accordance with the established limits upon the application of such circumstances. See ¶ 19 A, supra.

(ii) The Florida Supreme Court failed to review expressly many of the errors asserted by Mr. Hitchcock in connection with the trial court's finding that there was

only one mitigating circumstance. This omission was particularly egregious in Mr. Hitchcock's case, for in other death penalty cases in which the trial judge has failed to find mitigating circumstances upon factual records similar to the record in his case, the Florida Supreme Court has reversed death sentences. The unreviewed errors include failure to find the nonstatutory mitigating circumstance of Mr. Hitchcock's potential for rehabilitation, as argued by counsel in connection with the age of petitioner (TAS. 23-25; TS. 5), see Simmons v. State, 419 So.2d 316 (Fla. 1982); the failure to find the nonstatutory mitigating circumstance of mental or emotional problems (which are demonstrated but do not meet the criteria of a statutory mitigating circumstance), as alleged in paragraphs 19 B (1) (a) and (b), supra, see Moody v. State, 418 So.2d 989 (Fla. 1982); and the failure to find doubt about guilt, as alleged in paragraph 19 B (1) (b), supra, see Taylor v. State, 294 So.2d 648, 652 (Fla. 1974).

(d) Accordingly, the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Proffitt v. Florida, supra, 428 U.S. at 251, was revoked in Ernie Hitchcock's case.

G. As applied, the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to channel jury discretion and permits the interjection of irrelevant factors into the sentencing process by the jury and the judge.

(2) The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution, in-

cluding but not limited to geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the sex of the defendant, the occupation of the victim, the race of victim, and the prior relationship between the victim and the defendant.

(a) With respect to the factor of geography, preliminary studies have shown that Orange County sentences people to death in statistically significantly greater proportion than in other metropolitan areas in Florida and than in the State as a whole. From whatever perspective the statistics are examined, the results show the same disparity. Orange County sentences to death 16.3% of the persons indicted for first degree compared to 8:6% in other metropolitan areas and 9.1% statewide (significance: .0578 and .039 respectively). Orange County sentences to death 41.7% of the persons convicted of first degree murder, compared to 22.5% in other metropolitan areas and 24.3% statewide (significance: .032 and .031 respectively). Orange County sentences to death 54.2% of the persons convicted of first degree murder in which a felony is involved, compared to 32.0% in other metropolitan areas and 35.0% statewide (significance: .105 for statewide comparison). See the testimony concerning the preliminary study from which these figures were drawn, developed in Henry v. Wainwright, attached hereto as Exhibit A.

(b) On the basis of a twenty-one county study (including Orange County) concerning all cases from 1972 through 1978 in which first degree murder indictments were returned, conducted by Professor Linda A. Foley, of the University of North Florida, the sex of the offender is significantly related to the imposition of the death penalty in Florida. Professor Foley reports that only 1.6% of women indicted for first degree murder received the death penalty in her study of Florida cases, compared to 12.4% of men indicted for first degree murder (statistical significance: .02). See Professor Foley's report of her study, attached hereto as Exhibit B, at p. 7.

(c) On the basis of the Foley study, the occupation of the victim is significantly related to the imposition of the death penalty in Florida. Among persons indicted for first degree murder, 11% received the death penalty if their victims were in skilled jobs, and 27% received the death penalty if their victims were in professional jobs (significance: .019). See Exhibit B, at p. 8.

(d) On the basis of Professor Foley's study the race of the victim is significantly related to the imposition of the death penalty in Florida. Of those persons in her study (regardless of their race) who were charged with the murder of a white victim, 16.5% received the death penalty, compared to only 2.8% of those charged with the murder of a black victim (significance: .00001). See Exhibit B, at 7.

- (e) Given the opportunity for discovery, defendant submits that a similar prima facie case of arbitrary imposition of the death penalty can be demonstrated with respect to the economic status of the defendant, the prior relationship between the victim and the defendant, and other impermissible factors.
- (4) Because of an inherent ambiguity in the Florida death penalty statute concerning the scope of mitigating circumstances which could be considered in sentencing, persons tried under the statute prior to July 3, 1978 were deprived of their right to a fully individualized sentence determination under the Eighth and Fourteenth Amendments.
- (a) Since the revisions of the Florida death penalty statute effective on December 8, 1972, the statute has contained the following delimiting language concerning the aggravating and mitigating circumstances which may be considered by the jury and judge in determining the sentence in a capital trial:
  - "Aggravating circumstances shall be limited to the following: ...." § 921.141(5).

"Mitigating circumstances shall be the following: ..." § 921.141(6).

(b) Because of the slight difference in the wording of these phrases, the statute was ambiguous as to whether mitigating circumstances not enumerated in the statute could be considered. In 1976, the Supreme Court of Florida held expressly that non-enumerated mitigating circumstances could not be considered in Cooper v. State, 336 So.2d 1133, 1139 n.7 (Fla. 1976). However, just two years therafter, the Court held that the statute had always permitted the consideration of non-enumerated mitigating circumstances in Songer v. State, 365 So.2d 696, 700 (Fla. 1978). At the very least, therefore, this provision of the Florida death penalty was ambiguous. Further, the Supreme Court of Florida has agreed that it was ambiguous, at least by implication. By recognizing that the trial courts, in refusing to consider non-statutory mitigating circumstances prior to Songer, were following the law as they believed it to have been interpreted at the time, the Court has conceded the ambiguity inherent in this provision of the statute. See Jacobs v. State, 396 So.2d 717, 718 (Fla. 1981); Perry v. State, 395 So.2d 170, 174 (Fla. 1981).

(c) This ambiguity in the statute led to the consistent practice by defense counsel of limiting their investigation of mitigating circumstances to those enumerated in the statute, and to the equally consistent practice by Circuit Court judges of refusing to consider non-statutory mitigating circumstances. Not until *Lockett v. Ohio*, 438 U.S. 586 (1978) was decided on July 3, 1978 was there a clear constitutional mandate overriding the ambiguity in the statute and requiring defense counsel to investigate and Circuit Court judges to consider, evidence of non-statutory mitigating circumstances.

(d) Accordingly, capital defendants tried between December 8, 1972 and July 3, 1978, including Mr. Hitchcock, were systematically deprived of the fully individualized consideration of their character and record and of

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the circumstances of their offense, to the extent that evidence of these matters fell outside the enumerated mitigating circumstances. During this period, therefore, as applied, the Florida death penalty statute deprived capital defendants of their Eighth and Fourteenth Amendment rights articulated in Lockett v. Ohio, supra.

## Other Required Information

- 20. Each of the grounds listed in paragraphs 18 and 18 has been previously presented to the Supreme Court of Florida, and each has been rejected, or was in the process of being presented to the Florida courts through post-conviction proceedings pending at the time this petition was drafted.
- 21. There are no appeals pending in any state or federal courts relating to the judgment and sentence under attack, except as noted in paragraph 11, supra.

22. Petitioner has been represented by the following

counsel:

- (a) at trial and sentencing, by Charles A. Tabscott, of Orlando, Florida:
- (b) on appeal to the Supreme Court of Florida, by Richard L. Jorandby, Esquire, et. al, of West Palm Beach, Florida:
- (c) In Florida 3.850 and other collateral proceedings, by the undersigned counsel; and

(d) in 3.850 appeal to the Supreme Court of Florida, by the undersigned counsel.

- 23. Petitioner was sentenced on the only count of the Indictment.
- 24. Petitioner has no other sentence of imprisonment to serve other than the sentence which is challenged herein.

## WHEREFORE, Petitioner Hitchcock prays:

1. That this Court forthwith issue an order staying his execution pending final disposition of this matter and further order of this Court:

2. That a writ of habeas corpus be directed to Respondents:

3. That the State of Florida be required to appear and

answer the allegations of this petition;

4. That Petitioner be accorded a de novo evidentiary hearing on the allegations of this petition, at which he is present, since he did not receive a full and fair evidentiary hearing in state court, as required by Townsend v. Sain, 372 U.S. 293, 312 (1963);

5. That, after full hearing, Petitioner be discharged from his unconstitutional confinement and restraint and/ or relieved of his unconstitutional sentence of death;

6. That Petitioner, who is indigent, be granted sufficient funds to secure expert testimony and lay testimony necessary to prove the facts as alleged in his petition;

7. That Petitioner be granted the authority to proceed in forma pauperis, including the right to obtain subpoenas in forma pauperis for witnesses and documents necessary to prove the facts as alleged in the petition;

8. That Petitioner be allowed a period of sixty days, which shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

9. That Petitioner be allowed to amend this petition up to and including the commencement of the hearing

requested herein; and

10. That Petitioner be allowed other, further and alternative relief as may seem just, equitable, and proper under the circumstances.

Respectfully submitted,

[Names/Addresses of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Verification of Petitioner Omitted in Printing]

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

Civil Action No. 83-357-Civ-Orl-11

[Title Omitted in Printing]

## MOTION FOR PAYMENT OF EXPENSES OF WITNESSES, FOR FEES OF EXPERT WITNESSES, AND FOR LEAVE TO TAKE DISCOVERY

Petitioner, JAMES ERNEST HITCHCOCK, by and through his undersigned counsel, moves this Honorable Court for an order (1) allowing reasonable expenses and fees to employ experts to enable Petitioner to adequately present proof regarding allegations in his Petition for Writ of Habeas Corpus; (2) allowing reasonable expenses for lay witnesses; (3) requiring the State to produce the documents or provide the information necessary for these experts' analysis, or in the alternative, providing the necessary expenses and fees for the collection of such information by the Petitioner; and (4) allowing Petitioner to take discovery regarding allegations in his petition for a writ of habeas corpus. As grounds therefore, Petitioner states:

- 1. Petitioner was adjudicated guilty of first degree murder on January 21, 1977, and was sentenced to death on February 11, 1977.
- 2. Petitioner has filed with this Court his amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.
- 3. Petitioner is currently indigent and is represented by the Office of the Public Defender, Fifteenth Judicial Circuit, West Palm Beach, Florida. Petitioner has previ-

ously been declared indigent for trial and appellate proceedings in this cause, and has been allowed to proceed in forma pauperis herein.

## Application of Death Penalty on Basis of Arbitrary Factors

4. Petitioner's habeas corpus alleges, *inter alia*, the arbitrary, disparate, and disproportionate application of the death penalty in Florida. Specifically, paragraph 19G(2) of the petition alleges:

"The death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution, including but not limited to, geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the sex of the defendant, the occupation of the victim, and the race of the victim."

The issue concerns, therefore, the actual application of the death sentence in Florida and the showing that in practice the perceived controls in the Florida capital sentencing statutory scheme are inadequate to channel the sentencing discretion of judges and juries sufficiently to meet the Eighth Amendment commands of Furman v. Georgia, 408 U.S. 238 (1972). The death penalty is unique among all criminal punishments and thus mandates a unique need for fairness and freedom from arbitrary imposition-in short for reliability. Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). Accordingly, it is constitutionally required that the imposition of the death penalty be evenhanded and consistent. See Proffitt v. Florida, 428 U.S. 242, 258-260 (1976). The evidence of its application, which Petitioner intends to show to this Court, reveals gross disparities in its imposition from county to county and from case to case, dependent primarily on the presence or absence of illegitimate factors. The existence of such wide disparity in the Florida capital sentencing scheme does not meet the standard of evenhanded application. Moreover,

the pattern of the actual application of the death sentence demonstrates that the statutes does not function to channel sentencing decisions and that it is imposed in a wanton, freakish and irrational manner such as to shock the conscience in violation of the Eighth Amendment.

- 5. The preliminary data in support of this issue and available to Petitioner at this time are contained in Appendices A and B to the Petition for Writ of Habeas Corpus. In summary fashion the data shows the following, as alleged in the petition:
- (a) With respect to the factor of geography, the death penalty is nearly two and one-half times more likely to be imposed in the panhandle than in the southern portion of the state; the northern and central regions fall about midway between these two extremes. The probability that such differences occurred by chance, given even-handed disposition of the death penalty and comparable offenses committed across the state, is extremely low, well be-preliminary data will show that the death sentence is imposed with grossly disproportionate frequency in Orange County. Specifically Petitioner alleges that the data will demonstrate that approximately the same percentage of homicide charges result in first degree murder indictments in Orange County as compared to the other regions of the state; that the percentage of death sentences as compared to the first degree murder indictments, first degree murder convictions, and first degree felony murder convictions is grossly disporportionate in Orange County; that such figures are statistically significant; and that there is no legitimate factor which can explain these disparities. Further, Petitioner submits that, as shown by the preliminary data, the broader data will show that the death penalty is imposed with grossly disporportionate frequency, in Orange County and in Florida.
- (b) On the basis of a twenty-one county study (including Orange County) concerning all cases from 1972 through 1978 in which first degree murder indictments were returned, conducted by Professor Linda A. Foley,

of the University of North Florida, the sex of the offender is significantly related to the imposition of the death penalty in Florida. Professor Foley reports that only 1.6% of women indicted for first degree murder received the death penalty in her study of Florida cases, compared to 12.4% of men indicted for first degree murder (statis-

tical significance: .02).

(c) On the basis of the Foley study, the occupation of the victim is significantly related to the imposition of the death penalty in Florida. Among persons indicted for first degree murder, 11% received the death penalty if their victims were in unskilled jobs, 25% received the death penalty if their victims were in skilled jobs, and 27% received the death penalty if their victims were in professional jobs (significance: .019).

(d) On the basis of Professor Foley's study, the race of the victim is significantly related to the imposition of the death penalty in Florida. Of those in her study charged with the murder ot a white victim, 16.5% received the death penalty, compared to only 2.8% of those charged with murder of a black victim (significance: .00001).

6. These data, as further analyzed in Appendices A and B to the habeas corpus petition establish at least prima facie grounds for relief and are proffered in support of this motion.

7. For complete analysis of this issue, however, data beyond that now available to Petitioner must be obtained. To the extent that other factors, such as aggravating and mitigating circumstances, may legitimately explain the disparities thus far revealed, Petitioner is entitled to analyze those factors and present the results of that analysis.1 To the extent that there are other illegitimate factors related to the imposition of the death penalty in

<sup>1</sup> Particularly in light of this Court's concerns in Henry, regarding "the nature of the offense itself" (Amended Petition for a Writ of Habeas Corpus, Appendix A, 162-164), such discovery is not only appropriate but necessary.

Florida, such as the economic status of the defendant or the degree of prior relationship between the defendant and the victim, Petitioner is entitled to analyze and present data relevant to such factors. For these reasons, Petitioner requests that the Court require the state to provide him with the following data, or documentation from which the following data can be obtained, or in the alternative, that he be provided with sufficient funds to cover the costs of obtaining the following data:

- (a) the yearly and total number of homicides committed in the entire state, by county, from January 1, 1973 to the present;
- (b) the yearly and total number of first degree murder indictments, broken down between premeditated and felony murder, in the entire state by county, from January 1, 1973 to the present;
- (c) the yearly and total number of first degree murder convictions, broken down between premeditated and felony murder, in the entire state, by county, from January 1, 1973 to the present;
- (d) the yearly and total number of death sentences imposed in the entire state, by county, from January 1, 1973 to the present;
- (e) with respect to the data in (a), the race, occupation, income, and sex of the victims of all homicides;
- (f) with respect to the data in (b), (c), and (d), the race, occupation, income, and sex of, and the degree of prior relationship between each victim and each defendant; and
- (g) with respect to the data in (d), the aggravating and mitigating circumstances in each case, along with a description of the type of murder, including the cause of death.

8. The data and statistical analysis referred to in paragraph 5, supra, are encompassed in a study of twenty Florida counties, including Orange County, for the period of 1973-1978.2 Since that study, other researchers at Stanford University, Professors Sam Gross and Robert Mauro, have updated and expanded the data and are currently in the process of analyzing the data. [Their data, however, does not encompass the breadth of data which Petitioner seeks to discover, see paragraph 7, supra.] Because the analysis of such data requires expert assistance—without which Petitioner cannot meaningfully pursue the facially valid claim to which the analysis of the data is relevant-Petitioner seeks, in addition to discovery, the provision of reasonable fees and expenses for experts. Specifically, he requests that he be allowed to retain the services of Professors Gross and Mauro and such other experts as may be necessary for the meaningful prosecution of this claim.

## Imposition of the Death Penalty Without Consideration of Available Evidence on Non-Statutory Mitigating Factors

9. In paragraph 10 B(4) of his petition for writ of habeas corpus, Petitioner has stated various grounds for

<sup>&</sup>lt;sup>2</sup> The Court may further recall from the Henry hearing that there was a discrepancy in the reported number of capital indictments occurring during the study period in Orange County, with Mr. Pierce testifying for the Petitioner that there were 92 indictments for first degree murder during this period (Transcript of Proceedings, Henry v. Wainwright, No. 79-584-Orl-Civ-R, January 11, 1980, at p. 153) and with Mr. Fasnacht testifying for the Respondent that there were 118 capital indictments during that period (id. at 186-191). To the extent that this seeming discrepancy may have undermined this Court's confidence in the testimony presented by Mr. Pierce, this should no longer have any effect, for counsel has subsequently discovered the reason for the discrepancy. Mr. Fasnacht's number included capital, non-murder indictments for sexual battery, [Fla. Stat. § 794.011(2)], as well as capital murder indictments. The difference can be accounted for by the inclusion of the non-murder indictments in Mr. Fasnacht's figure.

vacating the sentence imposed upon him, all of which rely on the same underlying facts: that there was significant non-statutory mitigating evidence which was available to be presented at the time of Mr. Hitchcock's trial.

10. In connection with executive elemency proceedings, Petitioner has investigated and developed substantial nonstatutory mitigating evidence which was available at the time of his trial. The expenses and assistance of counsel in this regard were (or will be) compensated pursuant to the provision of funds for clemency proceedings. However, clemency funds will not provide the assistance necessary to produce the testimony of expert and lay witnesses in Petitioner's habaes corpus proceeding. In order for Petitioner to be able to adduce the evidence in support of his claims in paragraph 19 B(4) of his petition, he must be provided funds to compensate his expert witness and for expenses for his expert witness and lay witnesses necessary to prove his claims. Without such funds, Petitioner, who is indigent and without the means to secure the presence of said witnesses, will not be afforded the opportunity for a full and fair hearing. [The state courts denied these funds, and Petitioner was unable to present these witnesses].

order sufficient funds for the following: (a) the expert witness fee of Dr. Elizabeth A. McMahon, in connection with these proceedings; (b) the expenses of Dr. McMahon in connection with these proceedings; and (c) the expenses of the lay witnesses necessary to establish the claims specified herein, including Deputy Sheriff Lee Baker, of Manila, Arkansas; Betty Augustine (Mr. Hitchcock's sister), of Manila, Arkansas; Martha Galloway (Mr. Hitchcock's sister), of Leachville, Arkansas; Brenda Reed (Mr. Hitchcock's sister), of Evansville, Tennessee; and Charles Hitchcock (Mr. Hitchcock's uncle), of Manila, Arkansas.

WHEREFORE, Petitioner respectfully requests this Court to grant this motion for payment of expenses of witnesses' fees of experts and for leave to take discovery.

Respectfully submitted,

[Names/Addresses of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

### IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

Civil Action No. 83-357-Civ-Orl-11

[Title Omitted in Printing]

#### MOTION FOR EVIDENTIARY HEARING

Petitioner, JAMES ERNEST HITCHCOCK, by the undersigned counsel, moves this Court for an order setting certain issues raised in Petitioner's amended habeas corpus petition for an evidentiary hearing, as provided for by 28 U.S.C. § 2254 and Rule 8 of the Rules Governing Section 2254 Cases in the United States District Court. In support of this request, Petitioner sets forth the following:

- 1) In his amended habeas corpus petition, Petitioner has raised two grounds for relief which require an evidentiary hearing: the grounds set forth in  $\P$  19B(4) and  $\P$  19G(2) of the amended petition.
- 2) As argued in the accompanying memorandum in support of this motion, each ground states a substantial claim for habeas corpus relief and each requires relief upon a showing of the truth of the underlying facts. The facts which Petitioner will present at an evidentiary hearing upon these claims are summarized herein.
  - 3) In ¶ 19B(4), Petitioner asserted that

"[t]he available evidence of relevant non-statutory mitigating circumstances was not investigated or presented in Petitioner's sentencing trial, because of defense counsel's belief that the Florida death penalty statute limited the sentencer's consideration of mitigating circumstances to those enumerated in the stat-

ute. Under these circumstances, Mr. Hitchcock was deprived of a sentencing proceeding which satisfied Eighth Amendment requirements, either by ineffective assistance of counsel or by operation of the Florida death penalty statute, or by both."

Petitioner will present the following testimony in support of this ground:

- (a) Charles Tabscott, Petitioner's trial counsel, will testify that at the time he represented Petitioner, he believed that the Florida death penalty statute, as construed by the Florida Supreme Court, permitted the jury and trial judge to consider only the circumstances enumerated in the statute in mitigation of punishment. Operating under this belief, Mr. Tabscott will testify that he focused upon the statutory mitigating circumstances in his pre-trial investigation and preparation as well as in his presentation of evidence and argument at trial. (See the affidavit of Mr. Tabscott, attached hereto as Exhibit A.)
- (b) To demonstrate the evidence of nonstatutory mitigating circumstances which could have been presented—had Mr. Tabscott believed that the law permitted the presentation of such evidence—Petitioner will then call various witnesses.
- (i) Dr. Elizabeth A. McMahon will testify concerning her psychological evaluation of Mr. Hitchcock in January, 1983. This comprehensive evaluation was conducted "to assess [Mr. Hitchcock's] psychological functioning at the present time and as it might relate to an incident of homicide which occurred on August 31, 1976, for which he has been convicted and sentenced to death." (Psychological Report by Dr. McMahon, February 14, 1983, p. 1, attached hereto as Exhibit B.) Dr. McMahon's testimony will indicate that a similar evaluation at the time of trial could have established two non-statutory mitigating circumstances in favor of Mr. Hitchcock. The first is lingering doubt about Mr. Hitchcock's guilt. Dr. McMahon's

evaluation has revealed that when faced with stressful situations, throughout his life beginning with his early childhood, Mr. Hitchcock's pattern of coping was to retreat and escape. Such a strongly entrenched coping mechanism, according to Dr. McMahon, would likely have pushed him to run upon his sexual experience with Ms. Driggers becoming stressful (either by her threat to tell her mother or by Richard's discovery of what was going on). To have turned upon Ms. Driggers instead and to have killed her would have been totally incongruent with his lifelong pattern of behavior. The second nonstatutory mitigating circumstance (which could have been established on the basis of a comprehensive psychological evaluation) is Mr. Hitchcock's unusual potential for rehabilitation. Unlike "the more typical picture of those who commit violent acts against other individuals," Dr. Mc-Mahon will testify that Mr. Hitchcock does not "evidence the same degree of immaturity, of strong drives towards immediate gratification, of impulsive acting out of emotions, or of hostility and aggression" and does not present a "history . . . of antisocial behavior . . . ." Accordingly, Dr. McMahon will testify that Mr. Hitchcock's potential for rehabilitation is great, that this potential could have been recognized at the time of trial, and that during the time since trial, Mr. Hitchcock has taken important steps toward full rehabilitation.

(ii) To demonstrate more fully the evidence that could have been presented regarding his potential for rehabilitation, Petitioner will then call various lay witnesses whose testimony could have established the substantiality of his good character because of the environment in which he grew up.

(aa) Lee Baker, a long-time friend of Mr. Hitchcock and his family and a deputy sheriff in Mississippi County, Arkansas, for 32 years, will testify that he first met Mr. Hitchcock when he was approximately seven years old, when Mr. Hitchcock's father was dying of cancer; that after his father's death, Mr. Hitchcock's

mother had a hard time making a living, which caused the children severe hardship; that when Ms. Hitchcock remarried, the man she married had a severe drinking problem which caused much worry on the part of Mr. Hitchcock; that Mr. Hitchcock was a very sensitive boy, who worried about his family's economic problems, and who consistently tried to help out in the family; and that Mr. Hitchcock was always a good worker, even at a very young age, always got along well with other children, was very respectful toward adults, and never had a problem with fighting or violence.

- (bb) Martha Galloway, one of Ms. Hitchccok's sisters, who is two years older than he, will testify that Mr. Hitchcock was "torn apart" by the death of his father and grieved over his father's death for a long time thereafter; that their family fell apart after the father's death because he had "kept the family together and kept things in order"; that the family's poverty grew even more desperate after the father's death, requiring all of the children to work frequent twelve-hour days in the cotton fields just to survive-but even then only to maintain a foothold, under conditions in which housing, clothing, and food were just barely enough to permit survival; and that upon their mother's remarriage to a man with a severe drinking problem, who became terribly abusive and violent toward their mother when he drank, Ernie grew increasingly worried and finally left home when he could no longer cope with this situation and the anxiety it created.
- (cc) Brenda Reed, one of Mr. Hitchcock's sisters, who is four years younger than he, will testify in greater detail concerning the environment created in their home by their stepfather's drinking and abuse of their mother and the tension which this created between the stepfather and the children.
- (dd) Betty Augustine, one of Mr. Hitchcock's sisters, who is eleven years older than he, will testify about her experiences with Mr. Hitchcock in which he, even as a

young child, would help his mother with daily household chores, and in which, after Ms. Augustine started her own family, Mr. Hitchcock would help her feed and take care of her children.

- (ee) James Harold Hitchcock, Mr. Hitchcock's brother who is fifteen years older than he, will testify about the homeless, uprooted feeling experienced by Mr. Hitchcock when their father died and how that feeling seemed to influence his behavior from that point on in his life. He will further testify about Mr. Hitchcock's admirable capacities as a worker, on the basis of their having worked together periodically over the course of their lives, and about Mr. Hitchcock's helpfulness toward other people, on the basis of the help extended to him and his family by Mr. Hitchcock.
- (ff) Charlie Hitchcock, one of Mr. Hitchcock's uncles, will also testify about Mr. Hitchcock's helpfulness toward other people, on the basis of the help Mr. Hitchcock gave him in performing chores associated with farmwork. He will also testify about an incident in which Mr. Hitchcock saved him from drowning after he had fallen into a river at a time when he was drunk.

## 4) In ¶ 19G(2), Petitioner asserted that:

"[t]he death penalty is imposed in Florida in an arbitrary, capricious and irrational manner, based upon factors precluded from consideration by the Florida death penalty statute and the United States Constitution, including but not limited to geographical differences in the willingness to seek and impose the death penalty, the economic status of the defendant, the sex of the defendant, the occupation of the victim, the race of the victim, and the prior relationship between the victim and the defendant."

In the accompanying Motion for Payment of Expenses of Witnesses, for Fees of Expert Witnesses, and for Leave to Take Discovery, at pages 2-6, Petitioner has detailed the evidence now available, as well as the discovery and expert assistance necessary to develop additional evidence, in relation to this claim. Following the completion of discovery and analysis of the newly-discovered data by experts, Petitioner will be able to provide a summary of the evidence which he will present in support of this claim at the evidentiary hearing requested herein.

WHEREFORE, Petitioner requests that the Court enter an order permitting an evidentiary hearing with respect to the issues raised in ¶ 19B(4) and ¶ 19G(2) of the amended petition for a writ of habeas corpus filed herein.

Respectfully submitted,

[Names/Addresses of Counsel Omitted in Printing]

[Certificate of Service Omitted in Printing]

#### [APPENDIX TO MOTION FOR EVIDENTIARY HEARING]

#### [EXHIBIT A]

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

[Title Omitted in Printing]

#### AFFIDAVIT OF CHARLES A. TABSCOTT

[Jurat Omitted in Printing]

Charles A. Tabscott, being duly sworn according to law, deposes and says:

- 1. I am an attorney duly licensed to practice my profession in the State of Florida. My office address is 46 Park Lake Street, Orlando, Florida 32803.
- 2. I am the attorney who represented JAMES ERNEST HITCHCOCK in pre-trial and trial proceedings in 1976 and 1977. My representation of Mr. Hitchcock was undertaken in the course of my employment as an assistant public defender.
- 3. I am aware of the current status of Mr. Hitchcock's case and of the claim that has been made in Rule 3.850 proceedings, and now in this proceeding, that available evidence of relevant non-statutory mitigating circumstances was not investigated or presented in Mr. Hitchcock's sentencing trial.
- 4. I do not have an independent recollection of whether I believed the Florida death penalty statute limited consideration of mitigating circumstances to the statutory

factors at the time of Mr. Hitchcock's trial. However, upon reviewing the trial transcript in Mr. Hitchcock's case, it is my opinion that during my representation of Mr. Hitchcock, my perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute. I believe that I was acting in accord with such a perception on the basis of the argument I presented in the penalty phase of his trial.

5. While I now know that there is no such limitation of the consideration of mitigating circumstances, I did in the past believe that the statute limited the consideration of mitigating circumstances to the statutory factors. I do not recall precisely when my perception of the requirements of Florida law changed; however, based on my current review of the case law and transcript, it appears that my perception changed subsequent to Mr. Hitchcock's trial.

/s/ Charles A. Tabscott
CHARLES A. TABSCOTT

[Dated June 1, 1983]

[Jurat Omitted in Printing]

#### [EXHIBIT B]

# ELIZABETH A. McMAHON, PH.D.

[Return Address/Letterhead Omitted in Printing]

February 14, 1983

Psychological Report
Confidential Material James Ernest Hitchcock

James Ernest Hitchcock is a 26 year old white single male who was evaluated at Florida State Prison on January 28, 1983, at the request of his attorney, Richard B. Greene, Esq. The purpose of the examination was to assess James' psychological functioning at the present time and as it might relate to an incident of homicide which occurred on August 31, 1976, for which he has been convicted and sentenced to death. Details of this event, as related in James' confession and his later statement at trial, are available elsewhere and, for the sake of brevity, will not be repeated here.

In addition to an extensive diagnostic interview, the following procedures were administered: Peabody Picture Vocabulary Test (PPVT), Rorschach, Hand Test, and Projective Drawings.

## Test Results

There is no indication in any of the test material or interview data of a major thought disorder or a major affect disturbance. James' score on the PPVT indicates that he is currently functioning with the Average Range of Intelligence. The personality evaluation revealed an extremely tense, anxious individual whose anxiety, at time, interferes with his ability to adjust. His percepts reflect feelings of helplessness in the face of severe environmental forces beyond his control that are perceived as threatening his personality organization. James tends

to deal with his anxiety by repression or by intellectualization and compulsiveness.

His projective material indicates good ties with reality, an awareness of moderate impulse toward gratification, and normal strength of unacculturated drives. He is introversive and somewhat self-absorbed, evidencing an ability to be introspective and to combine this with social awareness in efforts at problem solving. James' responses to the objective characteristics of the stimuli reflect sufficient rational control of his behavior and the potential to handle situations impersonally when the need arises.

Severe frustrations of affectional needs, probably originating in early childhood, and the need for dependency relationships can be seen in his texture-determined percepts. However, also evident is the repression or denial of these needs and the inhibition of any efforts to meet them for fear of rejection. This has resulted in anxiety and in excessive caution and constraint in interpersonal relationships. Indications of feelings of rejection, isolation, insecurity, inferiority and unrealized dependency can also be seen in the content of many of James' percepts.

His manner of responding to the more emotion arousing stimuli evidences repression of affect and attempts to maintain control of his responsiveness through distancing the emotional component. When this is successful, James is able, through introspection and intellectualization, to deal with his emotions in his own time and as he feels capable of addressing them. When this is not successful, there is a breakdown of his controls and rather impulsive, irrational behavior with poor judgment and lability may emerge.

Finally, there are, throughout James' material, indications of the process of change and maturity taking place. There are signs of immaturity, fear of "growing up", as well as anxiety and a lack of closeness in relationships. At the same time, there are indications of empathy with

others, of concern and sensitivity to the opinions of others, and of a greater psychological interest and involvement in interpersonal rather than impersonal events and issues. James' responses reflect his attempts to develop more adequate defense mechanisms than he has had in the past. His use of communication as a means of affecting goals is also indicative of the maturation process and of his willingness to be cognizant of and attentive to the wishes and ideas of others.

# Clinical Impressions

James E. Hitchcock is a 26 year old male of average intellectual abilities who evidences a great deal of inner tension and anxiety, unmet affectional needs, and repressive defense mechanisms. However, there are also strong indications of an ongoing process wherein he is developing more mature interpersonal behaviors and more adequate defense mechanisms.

The sixth of a sibling group of seven, James was born in Arkansas to a couple who were sharecroppers. The family was apparently extremely poor, moved frequently with the crops, and his parents and two oldest siblings had little or no formal education. None of the children went beyond the seventh grade. His father died of cancer when James was seven years old and his mother, who is epileptic, attempted to raise the five children still at home by herself. She remarried approximately six years later. James' stepfather was, reportedly, a good worker when they first married and drank only on weekends. However, over the next three years, he became a total alcoholic and was later hospitalized as a result. According to James, his stepfather was physically abusive toward his mother and verbally abusive toward the children.

All of the children left home at early ages, James at 13 years. From then until he was 17, he moved back and forth among his relatives staying with each from two weeks to six or eight months. At 17 years of age

he was arrested for five burglaries all committed at the same time. He stated that he and another young man were drinking and they went in and out of the back doors of a row of business establishments, including a Sears Roebuck store and the local power company. This occurred approximately ten miles from his hometown. James spent 18 months in prison and then came to Florida, again living first with one brother, then the other, then a girlfriend, and finally a brother again—his longest residence being the six months he spent with his girlfriend.

He stated that he began the use of alcohol at age 16, drank for about six months and, since then has had only an occasional beer as he becomes drunk on four. Aside from some experimentation, his use of drugs has been confined to marijuana and that only sporadically.

As described by James, his childhood was spent in an environment—both home and community—that was forced to concentrate on work and bare survival with little time or energy left over for affection, family activities, etc. His memories of his father are very few but fairly good. He was excluded from much knowledge of or any participation in his father's illness and death.

He related that his mother was not affectionate but that he knows that she loved him by the things that she did for him; e.g., she worked, took care of the children, put him in school, and took care of him when he was hurt. His mother's seizures frightened him and he said that he would generally leave the house when she had one for fear that his sister would ask him to help with his mother. He disliked his stepfather because of his abuse of his mother and, on one occasion, hit him with a hammer when he threatened to strike his mother. After doing this, he ran away and did not return home until he was told that he had no seriously injured his stepfather.

James' pattern of coping, beginning when he was quite small, was to retreat and escape. When he could not see his father or accompany his parents to the hospital for his father's treatments, he would passively go off by himself, or with his dog, and go fishing, play in the woods, etc. He would withdraw from his mother's seizures, ran away after the altercation with his stepfather, and eventually left home to get away from the increasing violence. There are also indications from his history that he began to develop repression as a coping mechanism very early in life. On the one hand, he relates a life of poverty, hard work, enough to eat but "short on clothes", seldom any spending money except what he earned himself, and being quite shy around other people. On the other hand, he describes going through his childhood in an "unconscious" manner, day in and day out, just having fun, wrestling with his dog, playing with other kids, etc.

These two accounts are inconsistent and suggest that he was beginning to handle unpleasant feelings by "tuning them out" and by running away from them—internally and externally.

When asked the reason for his constant moving, James' response was that it was job related, that he would run out of work or get bored which he did whenever he had learned the job. This is probably true, at least superficially, as James freely admits that he had never liked to work and only did so enough to be able to support himself. But that explanation is not enough to account for that many moves in that length of time.

More likely, judging from his test and interview material, James would begin to develop some feelings of affection, dependency, etc., for the family or relatives with whom he was staying. This would be something he wanted and needed very much yet would be very scarey for him, thus creating anxiety and conflict within him. As was his pattern, he would repress the anxiety as long as he could

and, when that was no longer effective, he would impulsively—and probably in an irrational and completely unorganized manner—escape from the scene, thereby quieting his anxiety and fears of rejection until the next time.

Although James initially confessed to the homicide on August 31, 1976, and then later denied it, only he and his brother Richard actually know at this point what truly happened. Certainly, such an act on James' part, or anyone else's, can never be completely ruled out. By the same token, it is an act that would be incongruent with his behavior pattern up to that point in his life and incongruent with the coping mechanisms which he had developed over the years beginning in childhood.

One must also question why James had ingested so much alcohol earlier that evening—a fact that has reportedly been verified by witnesses. That was not his usual drinking pattern. However, in view of his dynamics and the reduced inhibitions which would have resulted from his intoxification, the sexual involvement with his brother's stepdaughter was not surprising, as his unmet affectional needs would very easily have become a rather crude need for sexual relations and might well have been expressed in a disorganized manner reflecting extremely poor judgment. But, upon discovery, one would predict given his dynamics that James' reaction would have been to have left town on the first bus out, heading in any direction.

During the six years that he had been on Death Row, James has utilized his time—at least during the past three years—quite productively. He has obtained his GED which, in that particular circumstance, requires considerable patience, perserverance, initiative, and self-reliance, since inmates cannot go out to classes and all the material is, therefore, self taught.

His ability to be introspective, combined with an increased social awareness, has resulted in a great deal of under-

standing of himself, his history, and his own dynamics. He has also put this to use to assist him in understanding others—both the other inmates and the correctional officers. Thus, he is able to empathize with others and appreciate their points of view. Along with this, he has developed his ability to communicate as a means of obtaining his goals rather than utilizing manipulation or aggression, as is more frequently observed in a prison setting.

#### Conclusions

James does not, in many respects, fit the more typical picture of those who commit violent acts against other individuals. His family, although very poor, was not physically abusive and the emotional neglect he experienced was more a function of ignorance and the circumstances than a function of intent. He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression. His history is less one of antisocial behavior then it is one of a marginal lifestyle of "getting by" and staying "uninvolved" with others due to his own anxiety and fear of rejection. Even that level of anxiety and concern about the opinions and feelings or others is atypical of this population.

If James' sentence were commuted and he were to be in "population", there is every reason to believe that not only would he function well but he would be a positive influence. He has the ability to act in the role of an arbitrator and could probably assist in defusing situations that arise between inmates and staff and/or among inmates. Also, he is bright and he has comprehended and retained considerable information from reading and from watching educational television. He would be able to handle any assignment such as the library, legal aide, etc. well.

Should this occur, James should also have the opportunity of being involved in individual psychotherapy. Again, he

is bright, articulate, capable of insight—all the characteristics which make one a good candidate for traditional psychotherapy. Although he had gained much on his own, he now needs competent assistance to help him confront and deal with those aspects of his personality that are most scarey and anxiety-provoking for him—the issues of affection and dependency that he is most likely to avoid facing—and help him to integrate and consolidate the progress he has already made.

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/s/ Elizabeth A. McMahon, Ph.D.

# IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

[Title Omitted in Printing]

# MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR AN EVIDENTIARY HEARING

Introduction

Petitioner, JAMES ERNEST HITCHCOCK, submits this memorandum of law in support of his motion for an evidentiary hearing with respect to the grounds set forth at paragraphs 19B(4) and 19G(2) of his amended notition for an evidence of the second seco

petition for a writ of habeas corpus.

The only issue to be decided by the Court with respect to the instant motion is whether the Court is required to grant an evidentiary hearing, and, if the Court determines that it is not required to grant an evidentiary hearing, whether it will nonetheless exercise its discretion to hold such a hearing. The principles which guide the determination as to whether a hearing must be held are discussed in *Townsend v. Sain*, 372 U.S. 293 (1963). Preliminarily in *Townsend*, the Court held, at 312, that

"where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew."

The Court thereafter discussed "the considerations which in certain cases may make exercise of that power mandatory," id., and further held that

"[w]here the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding."

Id. Because this test could be "too general... to explain the controlling criteria for the guidance of the federal habeas corpus courts," id. at 313, however, the Court determined that "[s]ome particularization may therefore be useful." Id. Accordingly, the Court held that

"a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

Id.

After determining whether an evidentiary hearing is mandatory with respect to the two evidentiary-based claims raised by Petitioner, the Court will then be guided by the provision of 28 U.S.C. § 2254 (d). Although this section of the habeas corpus statute to some extent "codified" the six Townsend criteria, the statute does not supersede Townsend, but still leaves to the Townsend criteria the role of guiding the threshold determination of whether a hearing must be held. Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981) (en banc). If the Court decides that Townsend mandates a hearing, "section (d) allocates the burdens of proof" in such a hearing."

<sup>&</sup>lt;sup>1</sup> If the hearing is mandatory, then one of the criteria listed in 2254(d) will ordinarily have been met, and the Petitioner will then proceed under the normal proponderance of the evidence standard,

Thomas v. Zant, 697 F.2d 977, 984 (11th Cir. 1983). If, on the other hand, the Court decides that Townsend does not mandate a hearing, the Court may nonetheless exercise its discretion to hold a hearing. Townsend, 372 U.S. at 318. In this event, 2254(d) would again play the "allocation of proof" role described in n. 1, supra.

Within this legal framework, Petitioner submits, in relation to the claims asserted in paragraphs 19B(4) and 19G(2) of the petition, (1) that he has "allege[d] facts which, if proved, would entitle him to relief," Townsend, 372 U.S. at 312; (2) that an evidentiary hearing is mandatory because "the merits of the factual dispute were not resolved in the state hearing[,] . . . that state factual determination is not fairly supported by the record as a whole[,] . . . [and] the material facts were not adequately developed at the state-court hearing . . .," Townsend, 372 U.S. at 313; and (3) in the alternative, if the Court determines that an evidentiary hearing is not mandatory, that an evidentiary hearing should nonetheless be held in order to provide Petitioner an opportunity to show "by convincing evidence that the factual determination by the state court was erroneous," 28 U.S.C. § 2254 (d).

#### ARGUMENT

# I. PETITIONER HAS ALLEGED FACTS WHICH, IF PROVED, WOULD ENTITLE HIM TO RELIEF

In setting forth his claims in paragraph 19B(4) and 19G(2) of the amended petition for a writ of habeas corpus, Petitioner has sufficiently stated his claims: he has alleged facts which, if proved, would entitle him to relief. The legal basis for each of these claims has been discussed in some detail in the memorandum previously

filed by Petitioner in support of his application for a stay of execution and will not be duplicated here. See, pp. 28-29, 52-55 of the memorandum in support of a stay. Incorporating the argument from that memorandum by reference, Petitioner submits that the following summary of the legal basis for each claim demonstrates that each claim is legally sufficient to require relief.

The claim asserted in ¶ 19B(4) turns upon two operative principles of law and/or fact. First, the available evidence of relevant, nonstatutory mitigating circumstances was not fully presented to the jury and the judge in Petitioner's sentencing trial. Critical mitigating evidence of Mr. Hitchcock's character, including his potential for rehabilitation, was omitted. And critical mitigating evidence of the possibility that Mr. Hitchcock did not commit the offense (giving rise to doubt about guilt which may not meet the standard of "reasonable doubt," but which nonetheless is sufficiently present to mitigate punishment) was omitted. This non-presentation, and consequent non-consideration, of relevant mitigating evidence implicates the Eighth Amendment, for the Eighth Amendment is concerned that "the sentencer . . . not be precluded from considering as a mitigating factor, any aspect of a defendant's character, record or circumstance of the offense . . . ." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original).

This implication of the Eighth Amendment leads to the second operative principle underlying this claim: that the death penalty statute operated to produce this result (i.e., the non-presentation and non-consideration of relevant mitigating evidence). As discussed in detail at pp. 32-36 of the stay memorandum, at the time of Petitioner's trial, the death penalty statute, as construed by the Florida Supreme Court, reasonably appeared to limit the jury's and judge's consideration of mitigating circumstances to the factors enumerated in the statute. See, Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976). In accordance with this provision of the law, Petitioner's

without having to rebut any presumption that the state court fact findings were correct. If, on the other hand, none of the criteria listed in 2254(d) is met, the Petitioner must then proceed under the burden of establishing "by convincing evidence that the factual determination by the State court was erroneous."

trial counsel believed that he could not affirmatively present and argue evidence of nonstatutory mitigating factors. He tried Petitioner's case in accord with this belief and, as a result, did not investigate or present evidence of available nonstatutory mitigating factors. The result was precisely the same as if the statute had explicitly and unambiguously precluded consideration of nonstatutory mitigating factors: Petitioner's sentencing proceeding violated the Eighth Amendment. Lockett v. Ohio, supra, 438 U.S. at 608.<sup>2</sup> The operation of the statute as well denied the effective assistance of counsel in the manner condemned in Brooks v. Tennessee, 406 U.S. 605 (1972), and Geders v. United States, 425 U.S. 80 (1976). Cf., United States v. DeCoster, 624 F.2d 196, 201 (D.C. 1979) (en banc).<sup>3</sup>

The claim asserted in ¶ 19G(2) likewise sufficiently states a claim for relief. In this paragraph, Mr. Hitchcock contends that despite the Eighth Amendment's requirement that sentencing discretion be suitably directed and limited, *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), and the Florida death penalty statute's attempt to comply with that mandate through the use of an exclusive list

of aggravating circumstances, Purdy v. State, 343 So.2d 4, 6 (Fla. 1977), the death penalty is still imposed in Florida for reasons other than those aggravating circumstances. He contends that death sentences are still imposed in Florida, for example, because the capital defendant by chance committed his or her homicide in one county instead of another, because the defendant is a man instead of a woman, because the victim held a job in a skilled or professional occupation instead of an unskilled occupation, or because the victim was a white person instead of a black person. If he were able to prove that factors such as these have played a determinative role in the decision to impose the death sentence in Florida, Mr. Hitchcock submits that he could establish a violation of Furman v. Georgia, 408 U.S. 238 (1972). With such proof, he could show that the attempted guidance of capital sentencing discretion, through the use of a discrete number of "'clear and objective standards,' " Godfrey v. Georgia, 446 U.S. 420, 428 (1980), has been futile—that the Florida death penalty statute has "simply papered over the problem of unguided and unchecked jury discretion," Woodson v. North Carolina, 428 U.S. 280, 302 (1976), and that death sentences have continued to be imposed on the basis of factors that the sentencer, on an ad hoc basis and on the basis of conventional wisdom, has deemed appropriate. In short, he could show that the Florida death penalty statute has "fail[ed] adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman" has occurred. Gregg v. Georgia, supra, 428 U.S. at 195 n.46.

Accordingly, in both paragraphs 19B(4) and 19G(2), Mr. Hitchcock has met the first requirement for obtaining an evidentiary hearing: he has alleged facts which, if proved, would entitle him to relief.

<sup>&</sup>lt;sup>2</sup> "To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." Id.

although Petitioner believes that counsel was "ineffective" only because the death penalty statute reasonably appeared to preclude the consideration of nonstatutory mitigating factors, if this Court were to find that counsel was not reasonable in this perception of Florida law, then his allegation of ineffective assistance in \$\perp 19B(4)\$ would necessarily require the more traditional analysis of counsel's "competency" in representing him. See, Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc). Under this alternative theory, however, a claim would also be stated, for counsel's failure to investigate would be ineffective and prejudicial under Washington—since the failure to investigate was for no tactical reason and the evidence not presented created a substantial disadvantage to Petitioner, by precluding the sentencer's consideration of clearly the most persuasive mitigating evidence available to Petitioner.

## II. AN EVIDENTIARY HEARING IS MANDA-TORY UNDER THE CIRCUMSTANCES OF PETITIONER'S CASE

Petitioner submits that he is entitled to an evidentiary hearing under  $Townsend\ v.\ Sain,\ supra$ , because he did not receive a full and fair evidentiary hearing in the state courts with respect to either claim for which he now seeks a hearing. Specifically, Townsend's circumstances (1), (2), and (5) require a hearing on the claim asserted in ¶ 19B(4), and the lack of any hearing in state court requires a hearing on the claim asserted in  $\P 19G(2)$ .

A. The non-presentation of mitigating circumstances claim [¶19B(4)] requires a hearing because the state courts refused to hear all the evidence essential to its determination.

When this claim was presented to the trial court in Mr. Hitchcock's Rule 3.850 motion, the trial court denied an evidentiary hearing and made no relevant fact-findings. On appeal, the Florida Supreme Court affirmed the trial court's disposition of the claim without a hearing, reasoning as follows:

"We agree with the state that the first claim, i.e., that the operation of law rendered Hitchcock's trial counsel ineffective, is a deprivation of due process claim scantily clothed as ineffective assistance of counsel.<sup>2</sup> On direct appeal, Hitchcock's counsel argued that presentation and consideration of mitigating evidence had been improperly limited and cited both Lockett v. Ohio, 438 U.S. 586 (1978), and Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977). In response the state relied on Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Hitchcock's witness at sentencing testified to Hitchcock's past life

and behavior, and trial counsel argued this evidence to the jury. The record conclusively demonstrates, therefore, that the limitation on mitigating evidence issue has been raised previously, has been fully considered, and has been found to be without merit. We now find nothing to indicate that Hitchcock's counsel was ineffective and hold that the test set out in *Knight v. State*, 394 So.2d 997 (Fla. 1981), has not been met. We further reiterate that the death penalty was constitutionally imposed in this case."

Appellant contends that the capital felony sentencing law in effect at the time of the trial and the instructions to the jury regarding sentencing improperly limited mitigating considerations to the circumstances listed in the statute in violation of Lockett v. Ohio, 438 U.S. 586 (1978). This issue, like the others already mentioned, could have been raised on direct appeal and therefore is not a proper subject for collateral attack of appellant's sentence.

Id. slip op. at 3. Hitchcock's attempt to distinguish Armstrong is unavailing because the instant claim boils down to merely another Lockett challenge."

Hitchcock v. State, —— So.2d ——, No. 63,667 (Fla., May 17, 1983) (slip opinion, 2-3). By its reference to Mr. Hitchcock's having raised "the limitation on mitigating evidence issue" on direct appeal, the Florida Supreme Court made relevant its disposition of that issue on direct appeal, which was as follows:

"Hitchcock next claims that section 921.141 unconstitutionally limits the consideration of mitigating factors and that he was improperly limited in presenting mitigating evidence. Again, we find no merit to these contentions. As stated in *Songer* v.

<sup>&</sup>quot;2 Although Hitchcock attempts to make his first issue cognizable through a nebulous due process/effectiveness of counsel claim, that claim is in reality no different from the one advanced in *Armstrong v. State*, No. 61,871 (Fla. Jan. 10, 1983), where we stated:

State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), 'all relevant circumstances may be considered in mitigation, and . . . the factors listed in the statute merely indicate the principal factors to be considered.' 365 So.2d at 700. After the jury returned its verdict, defense counsel asked for time to prepare for sentencing and was given a week for that purpose. At sentencing, however, defense presented only one witness. There is nothing in the record indicating that the trial judge limited the defense's presentation. Rather, it appears that the defense itself chose to limit that presentation."

Hitchcock v. State, 413 So.2d 741, 748 (Fla. 1982).

On the basis of the foregoing disposition of this issue by the Florida Supreme Court, Petitioner submits that he is entitled to an evidentiary hearing under Townsend's circumstances (1), or alternatively, under Townsend's circumstances (2) and (5). Circumsatnee (1) is that "the merits of the federal dispute were not resolved in the state hearing. . . . " 327 U.S. at 313. It is applicable where neither "express findings of fact have been made by the state court," nor has "the state court ... impliedly found material facts." Id. It is squarely applicable here because the Florida Supreme Court made neither express nor implied findings of fact regarding the mitigating circumstances issue—the court made no findings of fact at all. By equating Mr. Hitchcock's claim with the claim raised in Armstrong v. State, see n.2 in the quotation from the Hitchcock 3.850 opinion, supra, the court treated Mr. Hitchcock's claim as simply an attack on the death penalty statute. By then equating Mr. Hitchcock's claim with his related claim on direct appeal—that the statute and jury instructions unconstitutionally limited the consideration of mitigating circumstances and that the judge limited the presentation of mitigating evidence—the court reconfirmed its fundamental misperception of, rather than fact finding against, Mr. Hitchcock's claim.

As presented in the Rule 3.850 proceeding, Mr. Hitchcock's claim did not re-attack the constitutionality of the death penalty statute, nor the rulings of the trial judge. The claim attacked the sentencing process in his particular case—through which Mr. Hitchcock's lawyer did not investigate or present certain mitigating evidence because he believed that the law prevented the presentation of that evidence. As thus framed, the death penalty statute could still be held constitutional under this claim, even though its particular application in Petitioner's case was unconstitutional. Compare, Jacobs v. State, 396 So. 2d 713, 718 (Fla. 1981), and Perry v. State, 395 So. 2d 170, 174 (Fla. 1981), in which the court recognized and reversed death sentences because of an analogous "misrepresentation" of the law by trial judges, who, relying upon Cooper v. State, supra, believed that the statute limited consideration of mitigating circumstances to only those specifically enumerated.4 Ironically, the claim, based as it was upon the defense lawyer's perception of the law, went to the very question left open to Petitioner by the Florida Supreme Court's opinion on direct appeal. Following the court's rejection of Mr. Hitchcock's claim that the statute, the jury instructions. and the judge's rulings unconstitutionally limited the

<sup>\*</sup>See also, Muhammad v. State, 426 So.2d 533 (Fla. 1983), a case involving a pre-Cooper sentencing in which a claim was asserted that counsel was ineffective for failing to present nonstatutory mitigating evidence. There, the court found that counsel was not ineffective because he could not be "expected to predict the decision in Lockett v. Ohio [supra]." Id. at 538. This holding, of necessity, recognizes the reasonableness of reading Florida law as restricting the consideration of mitigating factors to only those in the statutes; and it implies that Lockett constituted a change in the law not retroactive in application) as it was being followed in Florida at the time. This is but further confirmation that the Florida Supreme Court has, in other cases, conceded that the death penalty statute could have been reasonably read by lawyers to limit the consideration of mitigating circumstances to those in the statute.

consideration of mitigating circumstances, the court re-

"[a]fter the jury returned its verdict defense counsel asked for time to prepare for sentencing and was given a week for that purpose. At sentencing, however, defense presented only one witness. There is nothing in the record indicating that the trial judge limited the defense's presentation. Rather, it appears that the defense itself chose to limit that presentation."

Hitchcock v. State, supra, 413 So.2d at 748 (emphasis supplied). This claim speaks precisely to why the "defense itself chose to limit [the] presentation" of mitigating circumstances—a claim which was in no way addressed on direct appeal. Accordingly, because the Florida Supreme Court mischaracterized Petitioner's mitigating circumstance claim as one previously decided, the state courts made no findings of fact respecting the claim, and an evidentiary hearing is required.

While Petitioner submits that the only rational reading of the Florida Supreme Court's Rule 3.850 opinion requires an evidentiary hearing for the foregoing reasons, the opinon does contain a sentence which could conceivably be construed as a finding of fact against this claim. At pages 2-3 of the slip opinion, supra, the court recited the following facts from the trial record: "Hitchcock's witness at sentencing testified to Hitchcock's past life and behavior, and trial counsel argued this evidence to the jury." This sentence might be construed as an implied finding of fact that Petitioner's trial counsel did not believe that he was limited to the statutory mitigating circumstances since, arguably, evidence of "past life and behavior" could be evidence of nonstatutory mitigating circumstances. It should not be construed as such an implied finding of fact, however, for as analyzed, supra, the Florida Supreme Court clearly held that the claim was identical to the claim concerning the "limitation on mitigating evidence . . . raised previously [in the direct appeal]," slip opinion at 3, and that it was "in reality no different from" an attack on the statute as limiting the consideration of mitigating circumstances, slip opinion at 2 n.2. Having characterized the claim in this fashion, the court's reference to the testimony presented at sentencing must be taken as a mere recitation of historical fact—rather than as a finding of fact that counsel did not operate under the belief that the presentation of mitigating evidence was limited to statutory mitigating circumstances—since the claim as characterized did not subsume the claim as presented.

Notwithstanding, even if this sentence were taken out of context and construed as a finding of fact, Petitioner would nonetheless be entitled to an evidentiary hearing on the mitigating circumstance claim because of two other factors identified in Townsend. If the Rule 3.850 appeal to the Florida Supreme Court is deemed the equivalent of a state evidentiary hearing-as it must be where the appellate court makes "factual determinations ... after a review of the trial record," Sumner v. Mata, 449 U.S. 539, 546 (1981)—this finding of fact as a result of that hearing "is not fairly supported by the record as a whole." Townsend v. Sain, supra, 372 U.S. at 313. The only evidence in the record which could support a finding that counsel did not believe his presentation of mitigating evidence was limited to statutory mitigating circumstances is the fact that counsel presented some testimony briefly describing Mr. Hitchcock's growing up in a family with seven children, where the parents picked cotton and the father died of cancer when Mr. Hitchcock was seven years old (Penalty Trial Transcript, 8-9). The remainder of the only mitigating witness's testimony concerned the statutory "psychological" mitigating circumstances (id., 7-8). Even these minute references to Mr. Hitchcock's early life, however, were presented very narrowly, without any of the facts about the extreme poverty experienced by the Hitchcock family

or of the extraordinary emotional toll taken on Mr. Hitchcock by these two narrowly-demonstrated biographical facts. Moreover, counsel did not argue these-or the mitigating facts concerning Mr. Hitchcock's non-violent character which had been presented as relevant to the question of guilt in the guilt phase of the trial (Trial Transcript, 737, 739, 744, 747, 749)—during the penalty phase arguments. Counsel simply reminded the jury of these facts for "whatever purposes you may deem appropriate." (Penalty Trial Transcript, 14). Instead. counsel argued only the statutory mitigating factors as mitigating against death (id., 21-25). Thus, to the extent that the "record as a whole" addresses this issue at all, the record is wholly inconclusive. Moreover, to the extent that it supports any finding as to this issue at all, it tends to support the facts as asserted by Mr. Hitchcock—that counsel operated under the belief that his presentation and argument of mitigating circumstances had to be confined to the statutory factors. Where the record is thus "carefully scrutinize[d]" with the "exacting" attention required by the Supreme Court, Townsend, 372 U.S. at 316, the record unquestionably does not fairly support the only conceivable finding made by the Florida Supreme Court. Compare, Thomas v. Estelle. 582 F.2d 939, 942 (5th Cir. 1978).

Finally, if the Rule 3.850 appeal is deemed the equivalent of a hearing, any finding of fact made therein is unreliable, and a new hearing is required, because "the material facts were not adequately developed at [that]... hearing" for a "reason not attributable to the inexcusable neglect of Petitioner." Townsend v. Sain, supra, 372 U.S. at 313, 317. Unquestionably, the facts not only material but critical to the determination of this issue were the facts Mr. Hitchcock sought to prove by the testimony of trial counsel and various witnesses who could have presented evidence of nonstatutory mitigating circumstances. See, the accompanying motion for an

evidentiary hearing. These facts were not presented because the state courts refused to permit their presentation when Petitioner timely proffered the facts at the first legally available opportunity. Thus, the inadequate development of material facts was in no way "attributable to the inexcusable neglect of Petitioner." Accordingly, Townsend, as well as the Eleventh Circuit's recent decision in Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983), require a de novo evidentiary hearing for this reason alone.

As the foregoing discussion demonstrates, therefore, Mr. Hitchcock did not "receive a full and fair evidentiary hearing in a state court," *Townsend*, 372 U.S. at 312, with respect to his ¶ 19B(4) claim, so this Court must provide such a hearing.

B. The arbitrary application of the death penalty claim  $[\P 19G(2)]$  requires a hearing, because no hearing was held with respect to this claim.

Unlike the claim asserted in ¶ 19B(4), upon which the equivalent of an evidentiary hearing was held in the Florida Supreme Court, the claim asserted in ¶ 19G(2) was not given any evidentiary consideration at all. The claim was deemed properly denied by the trial court because it failed to state a claim under Florida law. Specifically, the Florida Supreme Court held Mr. Hitchcock's factual allegations, even if true, "did not constitute a sufficient preliminary basis to state a cognizable claim." Hitchcock v. State, supra, — So.2d at — (slip opinion at 3). Accordingly, Townsend v. Sain, supra, requires an evidentiary hearing on this issue, for there has never been an evidentiary hearing at all, much less a "full and fair evidentiary hearing," after which "the state-court trier of fact . . . has reliably found the relevant facts," 372 U.S. at 312-313. And in this circuit, "a district court must hold an evidentiary hearing and determine the relevant facts when [as here] the state court has failed to [hold] a hearing." Jackson v. Estelle, 570 F.2d 546, 547 (5th Cir. 1978). Accord, Thomas v. Estelle, 587 F.2d 695, 697 (5th Cir. 1979); Mason v. Balcom, 531 F.2d 717, 722 (5th Cir. 1976).

III. EVEN IF THE COURT DETERMINES THAT A HEARING IS NOT MANDATORY, THE COURT SHOULD NONETHELESS EXERCISE ITS BROAD DISCRETION TO HOLD SUCH A HEARING

While Petitioner firmly believes that an evidentiary hearing is required on both of the issues specified, if the Court should rule against Petitioner in this regard, Petitioner urges the Court nonetheless to exercise its discretion to hold a full evidentiary hearing as requested in Petitioner's accompanying motion. The reasons for such an exercise of discretion are manifest.

In Townsend v. Sain, supra, the Supreme Court held that "where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court to which the application is made has the power to receive evidence and try the facts anew." Id. at 312 (emphasis supplied). Time and time again, the Townsend court emphasized that the district court's "power" and "discretion" to hold a hearing applies "[i]n all . . . cases" and "[in] every case" in which a factual dispute exists. Id. at 318. The only limit the Court has placed on the "sound discretion" of the federal district courts in this regard is that a hearing not be held on a claim that is "frivolous," Id.5

In enacting 28 U.S.C. § 2254(d) in 1966, and in approving the Rules Governing § 2254 Cases in 1977, Congress clearly reaffirmed *Townsend's* recognition of the federal courts' broad discretion to hold evidentiary hear-

ings in habeas corpus cases. Thus, the concluding sentence in section 2254(d) establishes the burden of proof in situations in which a discretionary "evidentiary hearing" is held "in the Federal court," under circumstances in which there is no mandatory duty to hold such a hearing. If Congress did not contemplate that discretionary hearings would frequently be held, it hardly would have wasted any effort on establishing procedures for such hearings. See, In re Wainwright, 678 F.2d 951, 953 (11th Cir. 1982).

Likewise, in 1977, Congress left Proposed Rule 8 of the Rules Governing § 2254 Cases intact, thereby affirming the Advisory Committee's statement that the holding of an evidentiary hearing, if not mandatory, is in the "discretion of the district judge," and the Advisory Committee's express assumption that such hearings will be held under Rule 8 in the "majority" of cases in which a non-frivolous factual issue is raised. Advisory Committee's Note to Habeas Rules 7 and 8.

This "sound discretion" to hold a hearing is particularly appropriate in Mr. Hitchcock's case for three reasons. First, because he is sentenced to die, this is probably Mr. Hitchcock's final opportunity to adduce evidence demonstrating the unconstitutionality of the procedures that resulted in his sentence of death. Because evidentiary hearings in federal habeas corpus proceedings have been recognized as an important means of assuring the reliability of judicial determinations, see, e.g., United States ex rel. Griffin v. Vincent, 359 F.Supp. 1072, 1073 (S.D.N.Y. 1973), and because the overriding concern in death cases is for reliability in the "determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). an evidentiary hearing should be held whenever, as in this case, it may shed any light on the fairness of the procedures leading to, or the constitutional validity of, a sentence of death. Second, the issue of whether a hearing is mandatory is, at the very least, a close question, and

<sup>&</sup>lt;sup>5</sup> Accord, Blackledge v. Allison, 431 U.S. 63, 76 (1977) (federal court has discretion to invoke habeas corpus fact-finding procedures whenever a claim raised is not "palpably incredible" or "patently frivolous or false").

for this reason alone, other courts have chosen to hold hearings. See, e.g., United States ex rel. Mangiaracina v. Case, 439 F.Supp. 913 (E.D.Pa. 1977), aff'd, 577 F.2d 730 (3d Cir. 1973); United States ex rel. Clayton v. Mancusi, 326 F.Supp. 1366 (E.D.N.Y. 1971), aff'd, 454 F.2d 454 (2d Cir.), cert. denied, 406 U.S. 977 (1972). Finally, while the Court may determine that no hearing is necessary, the evidence which Petitioner seeks to present nonetheless leaves the "factual disputes seemingly unresolved in essential totality," warranting a hearing. United States ex rel. Griffin v. Vincent, supra. See also, Rice v. Wolff, 388 F.Supp. 185 (D.Neb. 1974), aff'd, 513 F.2d 1280 (8th Cir. 1975).

Accordingly, in the interests of justice, the Court should grant the requested evidentiary hearing.

#### CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant the motion for an evidentiary hearing.

Respectfully submitted,

[Counsel's Name/Address Omitted in Printing]

[Certificate of Service Omitted in Printing]

### UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

No. 83-357-Civ-Orl-11

JAMES ERNEST HITCHCOCK, PETITIONER

vs.

LOUIE L. WAINWRIGHT, ETC., RESPONDENT

#### ORDER

On 17 June 1983, this cause came on for hearing on several motions by both parties. Petitioner's request in his motion for discovery is denied as to taking depositions of members, past and present, of the Florida Supreme Court. As to other discovery requests and requests for fees for witnesses and other discovery expenses, Petitioner is ordered to submit the following for later ruling in accordance with the Criminal Justice Act, 18 U.S.C. § 3006A:

- (a) A proffer of what testimony is expected and its relevance;
- (b) Specific dollar amounts requested per witness or item.

It is FURTHER ORDERED that Respondent need not file a response to the amended petition until ten days after this court's ruling on Respondent's motion to dismiss.

DONE AND ORDERED in Chambers at Orlando, Florida, this 21st day of June, 1983.

/s/ John A. Reed John A. Reed Judge

[Notification of Distribution Omitted in Printing]

## UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

No. 83-357-Civ-Orl-11

JAMES ERNEST HITCHCOCK, PETITIONER

vs.

LOUIE L. WAINWRIGHT, ETC., RESPONDENT

#### ORDER

For the reasons set forth in the Memorandum of Decision filed on even date herewith the court finds that an evidentiary hearing and further oral argument are unnecessary. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the Amended Petition for Writ of Habeas Corpus filed herein on 9 June 1983 is hereby dismissed.

FURTHER ORDERED that the stay of execution ordered by this court on 17 May 1983 shall terminate at 12:00 o'clock noon on 17 October 1983.

The Clerk of this court shall mail by certified mail a copy of this order and the *Memorandum of Decision* to the Petitioner, his attorneys, and the attorneys for Respondent. The Clerk of this Court shall also provide telephone notice of this order to the Clerk of the United States Court of Appeals for the Eleventh Circuit and shall thereafter mail to said Clerk by certified mail a copy of this order and the *Memorandum of Decision*.

DONE AND ORDERED in Chambers at Orlando, Florida, this 22nd day of September, 1983.

/s/ John A. Reed, Jr. John A. Reed, Jr. Judge

[Notification of Distribution Omitted in Printing]

### UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION

No. 83-357-Civ-Orl-11

JAMES ERNEST HITCHCOCK, PETITIONER

vs.

LOUIE L. WAINWRIGHT, ETC., RESPONDENT

#### MEMORANDUM OF DECISION

James Ernest Hitchcock filed a Petition for a writ of Habeas Corpus on 13 May 1983 and thereafter filed an Amended Petition for a Writ of Habeas Corpus on 9 June 1983. On 31 May 1983, Respondent filed a Motion to Dismiss. On 17 June 1983, the Motion to Dismiss was argued and treated by the court and the parties as having been directed to the Amended Petition. The court has reviewed the Amended Petition against the Motion to Dismiss and, as contemplated by Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, has independently reviewed the Amended Petition for arguable merit. The court has included in its review of the Amended Petition the entire state court trial record. The record was filed by the Respondent and is referred to at length in the Amended Petition. On the basis of its review, the court has concluded that the Amended Petition for habeas corpus relief lacks arguable merit.

The first ground asserted by the Petitioner is that the evidence was insufficient to support the felony murder theory. The pertinent homicide statute is § 782.04(1)(a), Fla. Stat. (1975). It provided: "The unlawful killing of a human being... when committed by a person engaged in the perpetration of ... any ... involuntary

sexual battery . . . shall be murder in the first degree and shall constitute a capital felony . . .". The pertinent statute defining sexual battery is § 794.011, Fla. Stat. (1975). It provided:

A person who commits sexual battery upon a person over the age of eleven years, without that person's consent, and in the process thereof . . . uses actual physical force likely to cause serious personal injury shall be guilty of a life felony . . .

The statute defines the phrase "serious personal injury" as "great bodily harm or pain, permanent disability, or permanent disfigurement." (Emphasis added).

The relationship which must exist between the homicide and the underlying felony has been established by opinions in Jefferson v. State, 128 So.2d 132 (Fla. 1961), and Campbell v. State, 227 So.2d 873 (Fla. 1969). In those cases, the court held that even if the underlying felony had been technically completed when the murder occurred, the felony murder statute would still apply, if the homicide was closely associated in point of time with the underlying felony and was committed as a means of escaping detection.

For purposes of a habeas challenge to the sufficiency of the evidence, the test is whether or not on the evidence adduced any rational trier of fact could have found beyond reasonable doubt the establishment of guilt. Jackson v. Virginia, 443 U.S. 307, 324 (1979). The Petitioner claims that the evidence was insufficient to support the finding of guilt on the theory of felony murder because the evidence was insufficient to establish the Petitioner utilized physical force likely to cause serious personal injury.

The Petitioner's confession which was introduced in evidence as a part of the state's case in chief contains an admission by the Petitioner that early in the morning of 31 July 1976 he entered the bedroom of his brother's thirteen year old stepdaughter and had sexual intercourse

with her. Following this, according to the Petitioner's own confession, she stated that she was hurt and desired to tell her mother. The Petitioner admitted in his confession that he struck her and carried her from the house, choked her to death and hid her body. Testimony presented also in the state's case in chief by Guillermo Ruiz, the medical examiner for Orange County, established that the victim had abrasions on her neck and also had evidence of trauma to her left eye and laceration around her left eye. Dr. Ruiz also testified that the girl's hymen had been lacerated within twenty-four hours before her death and that hair and sperm were found in her vagina.

The age of the victim, the fact that she was of previously chaste character, her insistence on telling her mother and the Petitioner's admission as to the time of the occurrence could have led a reasonable jury to the conclusion that the sexual relationship was not consensual. The same evidence also suggests that physical force likely to cause great bodily harm was utilized. It was the victim's specific statement that she was hurt and desired to tell her mother that led to the violence within the house and the choking which occurred outside. The evidence established through the medical examiner and through the confession of the Petitioner could have convinced a rational jury that "serious personal injury", as defined in Florida law, was inflicted on the victim.

The second ground for habeas relief relates to a reservation of ruling by the trial judge on the motion for judgment of acquittal made at the close of the state's case in chief. At that time, the trial judge denied the motion for judgment of acquittal on the state's theory of premeditated murder, but reserved ruling on the motion as it related to the felony murder theory (T. 719). The Petitioner asserts that this shifted the burden of proof and denied effective assistance of counsel.

It was error for the trial court to have reserved ruling on any aspect of the motion for judgment of acquittal. *Hitchcock v. State*, 413 So.2d 741 (Fla. 1982), cert. de-

nied, — U.S. —, 74 L.Ed.2d 213 (1982). The Florida Supreme Court, however, in the direct appeal in this case concluded that the error was harmless. This court's review of the record leads it to the same conclusion. As mentioned above, there was adequate evidence to take the case to the jury on the felony murder theory. The Petitioner's defense counsel anticipated the possibility that the motion would be denied and presented testimony dealing with the consensual nature of the sexual relations between the Petitioner and the victim. Furthermore, there is nothing in the record to suggest that the defense counsel's strategy was adversely affected by the court's ruling.

The third ground asserts that the trial court kept out nearly all of the evidence proffered by the Petitioner in support of his defense. Petitioner's defense was that his brother Richard had killed the victim. To support his theory, the Petitioner tried to show that his brother Richard had a reputation for violence whereas he, the Petitioner, treated young children well. The Petitioner also argues with respect to this ground that he was denied an opportunity "to show why he would have initially confessed . . . despite his innocence . . ."

The transcript of the testimony negates the validity of the third ground. Evidence of the Petitioner's character for nonviolence was repeatedly admitted through his own witnesses and to some extent through the testimony of his brother Richard and his sister-in-law (Richard's wife) Judy, both of whom were called as witnesses for the state.

Judy Hitchcock testified that in July 1976 the Petitioner was living in her home with her children and Richard. She testified she never saw the Petitioner hit or discipline any of the children (T. 267). Richard Hitchcock testified for the state that the Petitioner got along "all right" with the children.

Roy Carpenter, Sgt. Rick Dawes, Archie Sooter, Martha Hitchcock, James Hitchcock, Fay Hitchcock and Brenda Reed were witnesses called by the Petitioner. Carpenter testified that on the day after the "incident" (meaning the day on which the victim's body was found) when he saw the Petitioner in Winter Garden, the Petitioner said he wanted to organize a search party to look for his niece. Carpenter testified he never knew the defendant to commit "violence" (T. 725). Sgt. Rick Dawes of the Winter Garden Police Department testified that the Petitioner came into the Winter Garden Police Department on 31 July 1976 and surrendered peacefully (T. 227). Sooter testified he was a former roommate of the Petitioner (T. 731). He described the Petitioner's character as "calm and jovial" (T. 732) and testified the Petitioner had a girlfriend to whom he never saw the Petitioner direct any violence (T. 733).

Martha Hitchcock, the Petitioner's sister, testified that she lived with the Petitioner for over thirteen years and never knew him to be a violent person (T. 737). James Hitchcock, one of the Petitioner's older brothers, gave similar testimony (T. 739). James Hitchcock also testified the Petitioner stayed for an unspecified period with him and his three children (T. 741-742). Fay Hitchcock, the wife of James Hitchcock, testified she had known the Petitioner for nine years and had never known him to exhibit violence (T. 744). Brenda Reed, another sister of the Petitioner, testified she had never known him to exhibit violence (T. 747).

The testimony reveals that when the Petitioner was taken into custody he did not, contrary to the allegation in the Amended Petition, initially confess to the killing of Cynthia Driggers. The Petitioner testified that on the day of his arrest, he denied any involvement. It was not until four days later that he confessed (T. 771-772). At trial, the Petitioner explained in detail why he confessed. His first reason was that he had been in isolation for a period of four days and wanted to die (T. 772). His second reason was that his girlfriend had left him (T. 772). Then the Petitioner explained that he

had been on his own since age thirteen and was then age twenty. He further testified his father died when he was only six (T. 773-774). The final reason which he advanced for changing his testimony was that his brother Richard had been like a father to him and because of Richard's arthritic condition he "couldn't see him (Richard) doing this time" (T. 777). After that statement, the Petitioner said, "But from what my parents have stated to me and shown to me. I've took a crime for him before . . ." At this point an objection to the testimony was voiced by the state's attorney and the objection was sustained. Although there was no order from the court striking any portion of the testimony, the objection could only have been understood as having gone to the hearsay statement attributable to the Petitioner's parents. Hence, the record does not reflect that the Petitioner was prevented from developing his character for nonviolence or explaining why he made a confession totally inconsistent with his trial testimony. The transcript does indicate, however, that the Petitioner's attempts to introduce evidence related to Richard's character or reputation for violence were routinely rebuffed (T. 737, 740, 744, 777-778, 750-751, 794-795).

Normally rulings on the admission of evidence are not a basis for habeas corpus relief. Nettles v. Wainwright, 677 F.2d 410, 414 (5th Cir. Unit B, 1982). Where, however, such rulings preclude a defendant from adducing highly relevant testimony in support of his defense, they may of course constitute a denial of the Fourteenth Amendment's guarantee of a fair trial. Green v. Georgia, 442 U.S. 95 (1979); Wilkerson v. Turner, 693 F.2d 121, 123 (11th Cir. 1982). The issue then becomes whether or not the exclusion of the proffered testimony dealing with Richard's violent character and Petitioner's having previously taken some blame (i.e. "took a crime") for Richard was so relevant to the defense that its exclusion denied the Petitioner a fair trial.

Evidence of a person's character or a trait of character is usually not admissible to prove that he acted in conformity therewith on a particular occasion. See Rule 404(a), Fed. R. Evid. Whatever slight relevance such evidence might have is not sufficient to overcome the policy which favors its exclusion to protect reputation and to diminish the possibility of misleading the trier of fact. The reputation of Richard for violence had such slight probative value to support the Petitioner's contention, this court cannot conclude that its exclusion denied the Petitioner a right to a fair trial. The evidence shows without question that Richard was married to the mother of the thirteen year old victim and had been living with her and her four minor children (including the victim) for a period of at least two years before the murder (T. 273-274). Under these circumstances, there is just simply no logical connection between the proferred testimony and the fact sought to be corroborated. Similarly the proffered hearsay evidence was of such minimal significance its exclusion did not violate Petitioner's right to due process.

The fourth ground for relief asserts that a communication between the trial court and the jury in the absence of defense counsel denied Petitioner a fair trial. During the course of the jury deliberations, the jury sent a note to the trial judge which asked: "Is it required for us to recommend death penalty or life at this time?" The trial judge without consulting counsel for the Petitioner or the state responded: "You should not consider any penalty at this time—only guilt or innocence." See Record, page 165. The Petitioner argues that this communication to the jury denied him due process. According to Petitioner, it implied that the trial judge viewed the Petitioner as guilty and at the same time suggested to the jury that it should not consider the seriousness of the possible penalty in arriving at a verdict as to guilt or innocence. In the opinion of this court, the argument is frivolous. The trial judge had

earlier given the jury without objection an instruction virtually identical to that included in his response to the jury's note. At the close of the evidence on the guilt phase of the trial, the judge instructed the jury:

You are not to be concerned at this point with the imposition of any penalty in the event you reach a verdict of guilty. . . . [I]f you return a verdict of guilty of Murder in the First Degree, you will then be called on, in a separate sentencing proceeding, to return an Advisory Sentence as to whether the punishment should be death or life imprisonment, which Advisory Sentence the Court is not required to follow. When you have determined the guilt, or innocence of the accused, you have completely fulfilled your solemn obligation under your oaths as Jurors.

The trial judge also instructed the jury in the following language that the decision on guilt or innocence was theirs and that no comment by him should be taken as implying his view as to guilt or innocence:

Nothing I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find.

Finally, it is obvious from the note itself that the jury was well aware that the death penalty was a possible sanction attendant upon the conviction. Nothing in the judge's response could rationally be said to have diminished the seriousness of the offense in the jury's mind.

The fifth ground for relief is that the aggravating circumstances considered by the jury failed to channel sentencing discretion as required by the Eighth and Fourteenth Amendments. The first argument advanced in support of this ground is that the aggravating circumstance of sexual battery was not supported by adequate evidence. As noted above, the record contains ade-

quate evidence to support the felony of sexual battery as defined in § 794.011(3), Fla. Stat. (1975).

The Petitioner also argues under this ground that the catalog of aggravating circumstance delineated in the death penalty statute refers to "rape" not sexual battery. See § 921.141(5)(d), Fla. Stat. (1975). When the Florida death penalty statute was initially adopted, the term "rape" was used in Florida to denote the well-known offense. See § 794.01, Fla. Stat. (1973). Unfortunately the term was not modified in the death penalty statute when in 1974 the Florida legislature redefined "rape" in a comprehensive statute using the terminology "sexual battery". See § 794.01, Fla. Stat. (1974). Rape was defined in the statutes of Florida in effect when the death penalty statute was first enacted as follows:

794.01 Rape and forcible carnal knowledge; penalty.—

(1) Whoever of the age of seventeen years or older unlawfully ravishes or carnally knows a child under the age of eleven is guilty of a capital felony, punishable as provided in § 775.082.

§ 794.01(1), Fla. Stat. (1973). The offense of rape as thus defined is for all practical purposes the same as "sexual battery" defined in the present Florida statute and included in the trial judge's charge.

The remaining contentions which the Petitioner makes in support of the ground in question simply take issue with the validity of the aggravating circumstances which may be considered under the Florida death penalty statute. The statute, however, has been held to be constitutional and the Petitioner's argument is thus foreclosed. See *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Barclay v. Florida*, No. 81-6908, —— U.S. —— (6 July 1983).

The Petitioner's sixth ground for relief is that "(his) death sentence was imposed in proceedings which pre-

cluded by operation of law the consideration of relevant mitigating circumstances in violation of the Eighth Amendment requirement that there be no bar to the presentation and consideration of relevant mitigating evidence." With respect to this ground, the Petitioner argues that the trial judge refused to consider as mitigating the evidence relating to the Petitioner's mental and emotional problems, his voluntary surrender, the evidence as to his nonviolent character, doubt of guilt, and the fact that the state offered a life term in return for a plea of guilty. The short answer to this contention is that the trial judge was not required to consider those factors as mitigating. As pointed out in Barclay v. Forida, supra, the sentencing decision calls for the exercise of judgment. The only requirement of the Constitution is that the judgment be directed by suitable statutory guidelines. The trial judge stated before pronouncing sentence: "The court has weighed and considered the total evidence received in this case . . ." See transcript of Sentencing Proceedings 11 February 1977, at page 6.

Also under this ground, the Petitioner argues that the judge limited the jury's consideration to the list of mitigating circumstances set forth in the Florida death penalty statute. It is true that the jury was instructed on the mitigating circumstances delineated in § 921.141 (6), Fla. Stat. (1977); however, the jury was not precluded from consideration of any relevant evidence offered in mitigation of punishment. The trial judge told the jury its consideration of aggravating circumstances was limited to the statutory list. In contrast, he instructed the jury with reference to mitigating circumstances:

Should you find, however, sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the ag-

gravating circumstances which you have found to exist. The mitigating circumstances which you may consider shall be the following: . . . [the statutory mitigating circumstances] . . . If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive and (sic) in arriving at your conclusion as to the sentence which should be imposed.

Transcript of Advisory Hearing at 55-58.

Furthermore, no restriction was imposed on the evidence which Petitioner offered at the sentencing trial, and, in fact, testimony was adduced of nonstatutory mitigating circumstances dealing with his family background. In his argument to the advisory jury defense counsel discussed at some length Petitioner's family history, his nonviolent character, including the fact of his voluntary surrender, and his capacity for rehabilitation if offered a life sentence (T. of Advisory Hearing p. 12-26). The Petitioner's argument is foreclosed by Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983) because, for the reasons mentioned, neither the jury nor the trial judge was denied the use of any relevant evidence of mitigation. See also Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983); mod. on rehr. No. 82-5120, Slip Op. 6 Sept 1983.

Finally, the Petitioner argues that available evidence in mitigation was not presented either because defense counsel was ineffective or because the Florida statute precluded evidence of nonstatutory mitigating circumstances. The Florida statute in effect at the time did not expressly limit the jury's consideration to the mitigating circumstances delineated therein. Although dictum in Cooper v. State. 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), suggested that the statutory mitigating circumstances were exclusive, decisions of the Florida Supreme Court published prior to the trial indi-

cate that the statutory mitigating circumstances were not exclusive. Those cases are reviewed in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). The Petitioner suggests that his counsel was ineffective at the penalty phase of the trial because he did not adduce testimony of a psychologist discussing Petitioner's character and his capacity for redemption. Petitioner embodied in his Amended Petition at page 41 an excerpt from a report by a psychologist used at his executive clemency hearing as an example of what effective counsel should have offered. This type evidence Petitioner claims would have had two purposes. One would be to show doubt of guilt—the other to show Petitioner's capacity for rehabilitation. Counsel can hardly be considered ineffective in a capital case because at the penalty phase he did not adduce evidence to raise a doubt of guilt. Obviously at that stage, doubt of guilt has been eliminated as an issue for the jury's consideration. Counsel cannot be held ineffective, unless his choice of strategy was so patently unreasonable that no competent attorney would have chosen it and actual and substantial prejudice resulted from the choice. Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983); Wiley v. Wainwright, 709 F.2d 1412 (11th Cir. 1983). In the present case, substantial evidence as to Petitioner's character and background was presented to develop mitigating factors, and Petitioner's attorney strongly argued to the advisory jury the possibility of rehabilitation. In light of what was done, counsel cannot under the established standard be deemed ineffective for not producing opinion evidence from a psychologist.

The seventh ground for relief is stated as follows in the petition: "Petitioner's Eighth Amendment right to be punished in proportion to his crime, and his Fourteenth Amendment right to due process, were violated by the trial court's approval of the state's offer to Petitioner of a plea of nolo contendere and life imprisonment, followed by the court's imposition of the death sentence after Petitioner rejected the plea offer and proceeded to trial." Even if Petitioner's factual assertions are true, this ground is patently without merit. The argument of the Petitioner basically is that having rejected the tendered plea agreement, he could go to trial with immunity from the death penalty. The Petitioner cites North Carolina v. Pearce, 395 U.S. 711 (1969), United States v. Jackson, 390 U.S. 570 (1968), and Corbitt v. New Jersey, 439 U.S. 212 (1978) as supporting his contention. None of these cases supports the contention, and Bordenkircher v. Hayes, 434 U.S. 357 (1978) stands clearly in opposition.

The eighth ground for relief is that, "The Florida death penalty statute, as applied, deprives death-sentenced individuals, whose sentences are based upon erroneously found aggravating circumstances, of critical Eighth and Fourteenth Amendment rights, because the Florida Supreme Court consistently sustains such death sentences so long as there is at least one valid aggravating circumstance, and no substantial mitigating circumstances, present." This ground is without merit and subject to summary dismissal on the authority of Bar-

clay v. Florida, supra.

The ninth ground for relief is that, "The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case vitiated the court's unique responsibilities in the review of capital prosecutions." With respect to this ground the Petitioner argues that the Florida Supreme Court failed to review the aggravating circumstances, failed to review the claim that nonstatutory mitigating factors should have been found, and failed to review the trial court's failure to find as mitigating the mental or emotional problems of the Petitioner and doubt about his guilt.

With regard to the assertion that doubt about guilt should enter into the sentencing equation, the Petitioner's contention is without any support known to this court. The sentencing aspect of the trial does not commence until guilt has been established. Therefore, doubt about guilt should not enter the sentencing process. If a doubt about guilt exists, such would be a ground for a reversal of the conviction itself.

It is clear from the dissent in connection with the plenary appeal that the mental and emotional problems of the Petitioner were considered by the Florida Supreme Court. Furthermore, the opinion of the majority reflects that the case was carefully reviewed on the grounds presented.

The Petitioner's penultimate ground for relief challenges the Florida Supreme Court's former practice of reviewing psychological profiles of persons sentenced to death. This ground for relief has been foreclosed by Ford v. Strickland, supra.

The final ground for habeas relief is: "As applied, the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to channel jury discretion and permits the interjection of irrelevant factors into the sentencing process by the jury and judge."

Most of the argument embodied in the petition in support of this ground has been foreclosed by Proffitt v. Florida, supra, wherein the Supreme Court held the Florida death penalty statute to be constitutional. The following are the only arguments of Petitioner which warrant comment in the opinion of this court. The Petitioner claims that the instruction on aggravating and mitigating circumstances did not require the state to prove aggravating circumstances beyond reasonable doubt. This is simply inconsistent with the trial court's instructions which did require proof of aggravating circumstances beyond reasonable doubt. The Petitioner also complains that the jury instructions did not tell the jury how to determine whether or not the mitigating circumstances outweighed the aggravating circumstances. The answer to this is that the statutory scheme obviously requires a value judgment from the jury and the trial judge. It is not for that reason invalid. Barclay v. Florida, supra, Slip Op. at 10.

Next the Petitioner asserts that the trial judge's instructions could have left the jury with the impression that the burden of proving mitigating circumstances was on the Petitioner. Aside from the fact that such does not appear to be a logical conclusion from the instructions themselves, it does not make sense to talk of burdens of proof in connection with evidence of mitigating factors. This is so because no particular quality of proof is required to permit the jury to give probative effect to evidence tending to establish mitigation. The trial judge instructed the jury:

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive . . . (Emphasis added)

Transcript of Advisory Hearing at 57.

Finally, the contention is made that nonstatutory factors affect the imposition of the death penalty. The Petitioner asserts such factors as geography, sex of the defendant, occupation and race of the victim, as well as others may have influence on the sentencing decisions of the trial jury or trial judge, or both. This argument was rejected as a matter of law in *Spenkelink v. Wainwright*, 578 F.2d 582, 613 (5th Cir. 1978), where the court held:

... if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness—and therefore the racial discrimination—condemned in *Furman* have been conclusively removed. Florida has such a statute and it is being followed. The petitioner's contention under the Eighth and Fourteenth Amendments is therefore without merit.

It is obviously impossible for the legislature to devise any statutory scheme that will insure completely uniform results. Where, however, a statute has adequate safeguards against capricious imposition of the death penalty, and the statutory procedure is followed, disparate results in similar cases are not a constitutional problem in the absence of intentional discrimination on an impermissible basis. Such is not alleged here.

#### Conclusions

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts contemplates that on initial review of the petition by the district court, the judge may summarily dismiss the petition in its entirety if the petition lacks arguable merit. The court has carefully reviewed the Amended Petition, all attachments thereto and the entire record from the state trial court. Based thereon, this court concludes the Amended Petition lacks arguable merit and should be summarily dismissed without an evidentiary hearing.

DATED at Orlando, Florida, this 22nd day of September, 1983.

/s/ John A. Reed, Jr. John A. Reed, Jr. Judge

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## UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

#### No. 83-3578

JAMES ERNEST HITCHCOCK, PETITIONER-APPELLANT

v.

LOUIE L. WAINWRIGHT, RESPONDENT-APPELLEE

Oct. 18, 1984

Appeal from the United States District Court for the Middle District of Florida

#### OPINION ON GRANTING REHEARING EN BANC JAN. 8, 1985.

Before RONEY and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

RONEY, Circuit Judge:

James Ernest Hitchcock was convicted and sentenced to death for the strangulation of his brother's thirteenyear-old stepdaughter. After a direct appeal and postconviction proceedings in the Florida state courts, Hitch-

¹ Petitioner's conviction and sentence were affirmed by the Florida Supreme Court in *Hitchcock v. State*, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982). Petitioner's motion to vacate ¹ idgment and sentence was denied in state circuit court and the Florida Supreme Court affirmed. *Hitchcock v. State*, 432 So.2d 42 (Fla. 1983).

cock petitioned in federal district court for a writ of habeas corpus. The district court denied the writ without an evidentiary hearing. We affirm.

Petitioner Hitchcock raises numerous issues on this appeal: (1) whether Florida law discouraged his attorney from investigating and presenting nonstatutory mitigating factors; (2) whether the trial court considered petitioner's refusal to plead guilty in imposing the death sentence; (3) whether the evidence was sufficient to support his conviction; (4) whether the death penalty in Florida has been imposed in arbitrary and capricious manner either because of: (a) a defect in Florida's death penalty statute, Fla.Stat.Ann. § 921.141, (b) Florida law which required the jury be instructed on all lesser degrees of the charged offense whether or not there was evidence to support a conviction on the lesser degrees, or (c) racial discrimination; and (5) whether the Brown issue as decided in Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), should be reconsidered. We will address each issue in that order.

The facts of the case can be briefly summarized. Thirteen-year-old Cynthia Driggers was murdered by strangulation on July 31, 1976. Her body was recovered later that same day. An autopsy revealed that Driggers' hymen had been recently lacerated and that sperm was present in her vagina. Her face had cuts and bruises in the vicinity of the eyes. On August 4, 1976, petitioner confessed to the murder. He claimed that he and the victim had consensual sexual relations and he killed her when she became upset afterward and threatened to tell her parents. At trial, petitioner changed his story. He testified his brother Richard, the girl's stepfather, discovered Cynthia and him having intercourse and reacted by strangling the girl.

# Restriction of Mitigating Evidence

Petitioner argues the district court should have held an evidentiary hearing on the question of whether he was denied a fair and individualized capital sentencing determination by the preclusion of nonstatutory mitigating factors as a result of either the operation of state law or the denial of effective assistance of counsel because of his counsel's belief that Florida law barred such evidence. After examining the law regarding admission of mitigating evidence as developed in both Florida and federal courts and reviewing the facts of this case, we conclude no constitutional infirmity exists in regard to petitioner's sentencing hearing.

Florida re-enacted its death penalty statute following Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), which in effect held all extant capital penalty statutes to be unconstitutional. The new statute contained a list of factors designed to guide discretion in the imposition of the death sentence. Both aggravating and mitigating factors were listed. The statute explicitly limited those circumstances that could be considered as aggravating. No such restrictive language, however, was used in conjunction with the mitigating circumstances. See Fla.Stat. § 921.141 (1972). This feature was noted by the Supreme Court in its opinion holding the statute to be constitutional. Proffitt v. Florida, 428 U.S. 242, 250 n. 8, 96 S.Ct. 2960, 2965 n. 8, 49 L.Ed.2d 913 (1976) ("There is no such limiting language introducing the list of statutory mitigating factors.").

The importance of a lack of restriction on the sentencer's consideration of mitigating circumstances in fixing the penalty for a capital crime was confirmed by the Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978). The Court held unconstitutional an Ohio statute which limited mitigating evidence to a narrow set of factors. As to the distinction between the Ohio and the Florida statute, the Court made the following observation:

Although the Florida statute approved in *Proffitt* contained a list of mitigating factors, six members of the Court assumed, in approving the statute, that

the range of mitigating factors listed in the statute was not exclusive . . . None of the statutes we sustained in *Gregg* [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859] and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

438 U.S. at 606-07, 98 S.Ct. at 2965-66.

Two years prior to Lockett and six days after the decision in *Proffitt*, the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), used language which some contend should be interpreted as limiting the introduction of mitigating circumstances to those enumerated in the statute. The court upheld a trial court's refusal to admit testimony regarding a capital defendant's employment history as a mitigating circumstance. The defendant argued that his employment history demonstrated he was not beyond rehabilitation. Neither employment history nor potential for rehabilitation are statutory mitigating factors. See Fla.Stat.Ann. § 921.141(3). The court rejected the defendant's argument, reasoning that employment history was not particularly probative of a person's ability to conform to the law and that

[i]n any event, the Legislature chose to list the mitigating circumstances, which it judged to be reliable for determining the appropriateness of a death penalty . . . and we are not free to expand that list.

336 So.2d at 1139. In a footnote, the court emphasized the restrictive design of the Florida statute as regards to both aggravating and mitigating factors, stressing that the statute only would limit the arbitrariness condemned in *Furman* if discretion was limited "whether operating for or against the death penalty." 336 So.2d

at 1139 n. 7. See Perry v. State, 395 So.2d 170, 174 (Fla. 1980) (trial judge interpreted Cooper as barring non-statutory mitigating evidence).

Two years later and shortly after the decision in Lockett, the Florida Supreme Court in Songer v. State, 365 So.2d 696 (Fla.1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), clearly held the Florida death penalty statute does not restrict the mitigating evidence to the factors enumerated in the statute. In denying a motion for rehearing which argued that the Florida statute as interpreted by Cooper violated Lockett, the Florida court said:

In Cooper, this Court was concerned not with whether enumerated factors were being raised as mitigation, but with whether the evidence offered was probative. Chief Justice Burger, writing for the majority in Lockett, expressly stated that irrelevant evidence may be excluded from the sentencing process. 98 S.Ct. at 2965 n. 12. Cooper is not apropos to the problems addressed in Lockett.

As concerns the exclusivity of the list of mitigating factors in Section 921.141, the wording itself, and the construction we have placed on that wording in a number of our decisions, indicate unequivocally that the list of mitigating factors is not exhaustive. This was noted, in fact, in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 409 L.Ed.2d 913 (1976).

We have approved a trial court's consideration of circumstances in mitigation which are not included on the statutory list in Washington v. State, 362 So.2d 658 (Fla.1978); Buckrem v. State, 355 So.2d 111 (Fla.1978); McCaskill v. State, 344 So.2d 1276 (Fla.1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla.1976); Messer v. State, 330 So.2d 137 (Fla.1976); and Halliwell v. State, 323 So.2d 557 (Fla.1975), among others. Obviously, our construction of Section 921.141

(6) has been that all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered.

365 So.2d at 700 (footnote omitted).

Prior to that decision, this Court had addressed the issue of whether Florida's death penalty statute as interpreted in Cooper violated Lockett. In Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), we reviewed Proffitt and Lockett and stated "[t]he conclusion is inevitable that the [Supreme] Court continues to view Section 921.141 as constitutional. . . . Obviously, we are without power or authority to overrule the express finding of the Supreme Court." 578 F.2d at 621. Spinkellink was tried in 1973, prior to Cooper. Spinkellink presented and argued to the jury circumstances not fitting within the statutory mitigating categories.

Petitioner here was tried in January, 1977, which was after the Florida court's decision in Cooper but before the United States Supreme Court's decision in Lockett. Thus, petitioner argues that his counsel, misled by Cooper and without the clarification of Lockett and Songer, believed that he was limited to presenting evidence in mitigation that fit within one of the statutorily enumerated listings. In one context or another, this basic legal problem has been argued to this Court several times since Spinkellink but in no case has relief been granted because of Cooper.

In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), cert. denied, — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983), it was argued that Proffitt's trial attorney was ineffective because he failed to present evidence of nonstatutory mitigating circumstances during the penalty phase of his trial in March, 1974. The Court indicated that at the time of Proffitt's trial which was prior to Cooper, it was reasonable to assume that evi-

dence of nonstatutory mitigating circumstances was not admissible. 685 F.2d at 1248. In that case, however, the attorney testified that he believed that he could fit any mitigating evidence within the statutory mitigating factors and that, in any event, the defendant had instructed him not to introduce mitigating evidence. 685 F.2d at 1238-39.

In Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), it was argued that the jury instructions at the penalty phase of his trial restricted the jury from considering nonstatutory mitigating circumstances. Ford did not object to the instructions at trial or on direct appeal. The Court denied relief because Ford had not been limited in the admission of mitigating evidence and thus could show no prejudice. 696 F.2d at 813.

A similar issue was involved in *Foster v. Strickland*, 707 F.2d 1339, 1346-47 (11th Cir.1983), and the Court again held that no prejudice was shown because the petitioner did not suggest any supported nonstatutory mitigating evidence in the habeas corpus proceeding.

In the instant case, the district court dismissed this claim on the grounds that Florida law did not limit what evidence could be produced in mitigation at the penalty stage and that the record indicated petitioner's attorney did not think he was constrained by the statute. Based on our prior precedents, the district court properly denied relief and an evidentiary hearing. The evidence proffered to the district court does not establish the right to constitutional relief. The record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

Petitioner submitted an affidavit of the attorney, a public defender, who represented him at trial and sentencing. The affidavit of the attorney is carefully written. It states that although the attorney does not have

an independent recollection, he is of the opinion, upon reviewing the transcript, that during his representation of petitioner his perception was that consideration of mitigating circumstances was limited to the factors enumerated by the statute. It says he is aware of the current status of the case and that evidence of relevant mitigating circumstances was not investigated or presented in petitioner's sentencing trial. The affidavit does not indicate, however, that he would have done anything differently at that time. In Proffitt, this Court denied relief on a record where the defendant's attorney testified unequivocally that at the time of trial, he understood the Florida statute as limiting the mitigating evidence that could be introduced to that falling within the statutory mitigating circumstances. Although the attorney testified he believed he could fit any mitigating evidence within that scope, this Court stated that

the defense attorney's belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Fla.Stat. § 921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance.

Proffitt, 685 F.2d at 1248.

At the sentencing hearing, petitioner's attorney called petitioner's brother, James, who testified about petitioner at the age of five or six, about his father's death, about the farm work of both the mother and the father hoeing and picking cotton in Arkansas, that there were seven children in the family, and that he left "Ernie" to babysit with the brother's small children. Other testimony relating to petitioner's character had come out at trial. Petitioner testified he left home when he was thirteen because he could not tolerate seeing his stepfather abuse his mother. His mother testified that he was a

good child and he minded her. Three of his siblings told the jury he was not a violent person. During closing argument the attorney referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner voluntarily turned himself in. Finally, he admonished the jury to "look at the overall picture. You are to consider everything together... consider the whole picture, the whole ball of wax."

Petitioner has suggested several different pieces of evidence of nonstatutory mitigating circumstances which might have been presented. First, he argues that testimony by psychologists could have been introduced which would have corroborated lingering doubts about guilt and shown petitioner was an excellent candidate for rehabilitation. Such testimony would tend to establish his innocence, he says, by bringing out that he had coped with stressful situations throughout his life by retreating or escaping. There is no indication in this record, however, that the attorney at the time of sentencing would have followed this course even if he had known he could. Such matters are not judged from hindsight. Strickland v. Washington, — U.S. —, —, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). It should be noted that mental and emotional conditions are statutorily permitted mitigating considerations. Fla.Stat.Ann. § 921.141 (4) (b). Petitioner has cited us no cases holding that the mere failure to investigate or produce psychological or psychiatric evidence renders a sentencing proceeding unconstitutional.

Petitioner argues that greater details as to his upbringing in an environment of extreme poverty, his solid character traits, devotion to hard work, willingness to contribute to the family's support, and respect for adults should have been presented as evidence of nonstatutory mitigating factors. All of this was developed, however, to some extent for the jury. As described above, elements of petitioner's character and other background information were testified to by petitioner's brother, sisters, and mother as well as by petitioner himself. Petitioner's trial counsel reminded the jury of these facts during closing argument in the penalty phase.

It thus appears that petitioner was not denied an individualized sentencing hearing.

## Life Sentence Offered for Guilty Plea— Death Sentence Imposed After Conviction

Petitioner asserts that the state trial judge imposed the death sentence as punishment for petitioner's decision to go to trial rather than plead guilty. Petitioner alleged that the prosecutor and the judge together offered him a plea bargain which would exchange his plea of guilty for a life sentence. Petitioner declined the offer. After trial, the judge on the jury's recommendation sentenced petitioner to death. Petitioner argues his death sentence must be overturned because the trial judge's sentencing order did not explain why death became an appropriate penalty after trial.

The record is unclear as to whether the trial judge indicated he would approve a life sentence on guilty plea, or merely would consider it.<sup>2</sup> We treat the case as if the defendant would have received a life sentence on a guilty plea.

Although the principle petitioner argues would apply on a retrial and a resentencing after a successful appeal, North Carolina v. Pearce, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969); Blackledge v. Perry, 417 U.S. 21, 28-29, 94 S.Ct. 2098, 2102-2103, 40 L.Ed.2d 628 (1974), it does not apply to the failure of a plea bargain. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). In the "give-and-take" of plea bargaining, the state may extend leniency to a defendant who pleads guilty, foregoing his right to jury trial. Brady v. United States, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas. Compare United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) with Corbitt v. New Jersey, 430 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (statute valid when plea of non vult gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as with the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. Cf. Corbitt, 439 U.S. at 224 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).

Sentencing after conviction following a failed plea bargain presents a different situation from sentencing after a prior sentence and retrial. Upon a second conviction, a defendant stands in the same posture for sentencing that he did after his first conviction. Presumably all facts have been before the court for determination of the correct sentence. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a pen-

<sup>&</sup>lt;sup>2</sup> MR. TABSCOTT [defense counsel]: I would also remind the Court that prior to trial, the Court did argue to a plea of nolo contendere giving the defendant a life sentence on that plea. I have nothing further.

THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding, because your client didn't want to consider any plea.

MR. TABSCOTT: That plea was offered to him by the State and the Court, however. And, it is true he declined to enter that plea.

THE COURT: Any other matters?

MR. TABSCOTT: No, sir.

alty for the defendant's challenging of his conviction. See Wasman v. United States, —— U.S. ——, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). A defendant who pleads guilty, however, is in a markedly different posture than a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation. Moreover, by pleading guilty a defendant confers a "substantial benefit to the state:"

the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain from a defendant's point of view is the option of avoiding a possibly harsher sentence upon conviction at trial.

There is no merit to the argument that the sentencing judge should have set forth the reasons why the sentence after trial was greater than what would have been approved on a guilty plea. Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. Blackmon v. Wainwright, 608 F.2d 183 (5th Cir.1979), cert. denied, 449 U.S. 852, 101 S.Ct. 143, 66 L.Ed.2d 64 (1980). We have held that a mere allegation of discrepancy between a defendant's actual sentence and that which he would

have received had he foregone trial to plead guilty does not invalidate the sentence. Smith v. Wainwright, 664 F.2d 1194, 1197 (11th Cir.1981).

That the death penalty is involved in this case does not alter the principle of law. Given the different situations presented by a defendant who pleads guilty and a defendant convicted after trial, the possibility of different sentences depending on whether or not the defendant pleads guilty does not run afoul of the requirement that the "decision to impose the death sentence be, and appear to be, based on reason. . . . " Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). In this case, the Court imposed the death penalty only after fully considering the aggravating and mitigating circumstances and receiving the jury's recommendation of death. The procedure in Florida fully meets the Ninth Circuit's requirements that if a court participates in plea bargaining "the record must show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir.), cert, denied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

A trial court which approved a sentence based on a plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, nor impose such sentence only for conduct occurring after the aborted plea bargaining.

#### Sufficiency of the Evidence

In petitioner's guilt-innocence trial, the jury was instructed that it could find petitioner guilty of first degree murder upon alternative theories: premeditated murder or felony murder. The jury returned a general verdict of guilty of first degree murder.

Petitioner argues that the prosecution failed to prove felony-murder because the facts did not show that the felony of sexual battery had occurred but that the evidence supported his claim that the victim consented to sexual relations. He contends that since it cannot be determined on which theory the jury based its verdict, the conviction must be reversed. The issue turns on whether there was sufficient evidence to support the felony murder theory without running afoul of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

"[A] general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient. . . . " Zant v. Stephens, 462 U.S. 862, ---, 103 S.Ct. 2733, 2745, 77 L.Ed.2d 235, 252 (1983); Stromberg v California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). The test for sufficiency of the evidence on habeas corpus is whether viewing the evidence in the light most favorable to the Government "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560 (1979); Cosby v. Jones, 682 F.2d 1373, 1379 (11th Cir.1982). A defendant cannot be sentenced to death for participating in a felony with no intent to participate in a murder. Enmund, 458 U.S. at 801, 102 S.Ct. at 3378. Where the defendant himself participates in both the felony and the intentional killing, that principle does not apply. Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir.1983), cert. denied, — U.S. —, 104 S.Ct. 745, 79 L.Ed.2d 203 (1984).

The evidence at trial showed that petitioner was temporarily staying at his brother's house. On the night in question, he returned to the house at a late hour and entered through a window. Petitioner admitted having sexual relations with his brother's thirteen-year-old step-daughter. The young girl complained he had hurt her and that she was going to tell her parents. A medical

examination revealed the girl was previously of chaste character. This evidence was sufficient to prove that petitioner committed sexual battery by force. The evidence was sufficient to show that the homicide occurred intentionally, not accidentally in the course of an unrelated felony.

# Arbitrariness of Death Penalty in Florida

Petitioner raises three different arguments in support of the contention that the imposition of the death penalty in Florida violates the Eighth and Fourteenth Amendments. First, petitioner asserts that at the time of his trial the commission of rape in conjunction with the capital felony was listed as a statutory aggravating factor although the Florida legislature had replaced the crime of rape with the crime of sexual battery.

One of the aggravating factors in Florida's post-Furman death penalty statute was: "[t]he capital felony was committed while defendant was engaged . . . in the commission of . . . rape . . . ." Fla.Stat. § 921.141 (1972). In 1974, the Florida legislature rewrote the rape statute. 1974 Fla. Laws ch. 74-121 § 1. The legislature created the new crime of sexual battery which was broader than the repealed statutory crime of rape. See Fla.Stat.Ann. § 794.011. In 1976, the Florida Supreme Court dropped all reference to rape as an aggravating factor when it repromulgated its standard jury instructions. Florida Standard Jury Instructions in Criminal Cases at 77-82 (1976). The death penalty statute has now been amended to include the term sexual battery. 1983 Fla.Laws ch. 83-216 § 177.

There is no merit to petitioner's contention that at the time of petitioner's trial the law had become so unclear that it was likely to be applied in an arbitrary and capricious manner. The jury instructions at petitioner's guiltinnocence trial described the felony of sexual battery which is equivalent to the traditional crime of rape.<sup>3</sup> In charging the jury during the penalty phase, the court again used the term sexual battery instead of rape. The statutory aggravating factor mentioning rape thus was not applied in an arbitrary manner in petitioner's case. Contrary to petitioner's assertion, the legislature's recataloguing of rape as sexual battery in the statute books did not make the statutory aggravating factor referred to as rape so vague as to be susceptible of arbitrary or capricious application. See Hitchcock v. State, 413 So.2d 741, 747-48 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982).

Second, petitioner argues that at the time of this trial Florida required instructions on all lesser degrees of the charged offense even when there was no evidence to support these lesser offenses, thus rendering the system arbitrary and capricious. Petitioner waived any right to complain about the instructions as to lesser degree offenses in this case because the instructions given are the ones he requested. He waived any right to object to Florida's law on instructing on lesser degrees in other cases by his failure to object at trial or on direct appeal. Ford v. Strickland, 696 F.2d at 816-17. No "cause" for this failure to object can be shown because one of the major cases which forms the basis of petitioner's argument, Roberts

v. Louisiana, 428 U.S. 325, 334-35, 96 S.Ct. 3001, 3006-07, 49 L.Ed.2d 974 (1976), was decided the year before his trial. See Reed v. Ross, — U.S. —, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984).

In any event, the argument that Florida's system is unconstitutional because in some cases lesser degrees of the charged crime are instructed without factual support is without merit. At the time this case was tried, there was a difference in the treatment of lesser degrees of a charged crime and lesser included offense. Florida law has always prohibited instructions on lesser-included offenses unless the lesser-included offense is necessarily included in the charged offense or there is evidence to support a conviction on the lesser-included offense. Gilford v. State, 313 So.2d 729, 732-33 (Fla.1975); Brown v. State, 206 So.2d 377, 384 (Fla.1968); see Fla.Stat. § 919.14 (1969) (replaced by Fla.R.Crim.P. 3.490, Fla. Rules of Court). If the defense requested, however, the court at that time had to instruct on all lesser degrees of a charged offense whether or not the evidence supported those lesser degrees. Gilford, 313 So.2d at 733. This was true even though "[i]n many cases the elements of the lesser degrees are totally distinct from the offense charged." Brown, 206 So.2d at 381. In 1981, the Florida Supreme Court amended the procedural rule which mandated this result. In re Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla.1981). The rule now requires that the trial court charge only on those lesser degrees supported by the evidence. Fla.R.Crim.P. 3.490.

Although Florida's former practice of charging on all lesser degrees may have introduced some "distortion into the factfinding process" by allowing for jury pardon, see Spaziano v. Florida, — U.S. —, —, 104 S.Ct. 3154, 3160, 82 L.Ed.2d 340 (1984); Hopper v. Evans, 456 U.S. 605, 611, 102 S.Ct. 2049, 2052, 72 L.Ed.2d 367 (1982), no Eighth Amendment problem was created. Florida juries were not faced with a choice of convicting on a

<sup>3</sup> The judge charged the jury that:

It is a crime to commit sexual battery upon a person over the age of 11 years, without that person's consent, and in the process use or threaten to use a deadly weapon, or use actual physical force likely to cause serious physical injury.

Sexual battery means oral, and, or vaginal penetration by, or union with, the sexual organ of another . . . .

This language tracks the current sexual battery statute. Fla.Stat. Ann. § 794.011(h)(3). Now repealed Fla.Stat. 794.01 read as follows:

<sup>(2)</sup> whoever ravishes or carnally knows a person of the age of eleven years or more, by force and against his or her will... shall be guilty of a life felony....

lesser offense not supported by the evidence in order to avoid imposing the death penalty. It was this combination of a mandatory death sentence for murder and the required charging on lesser offenses that the Supreme Court condemned in *Roberts v. Louisiana*, 428 U.S. at 334-35, 96 S.Ct. at 3006-07, as leading to arbitrary results violative of the Eighth Amendment.

Third, petitioner's claim that the death penalty is applied in a racially discriminatory manner in Florida depends on the same statistical study rejected by this Court in Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir.), aff'd, — U.S. —, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983); see Spinkellink v. Wainwright, 578 F.2d 582, 612-616 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). The Supreme Court has held this argument to be without merit. Wainwright v. Ford, — U.S. —, 104 S.Ct. 3498, — L.Ed.2d — (1984); see Sullivan v. Wainwright, — U.S. —, - & n.3, 104 S.Ct. 450, 451-52 & n.3, 78 L.Ed.2d 210, 212-13 & n.3.

#### Brown Issue

Petitioner raises the so-called Brown issue decided in Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), and suggests we reconsider our decision based on an argument mentioned in a concurring opinion in Ford. The Brown issue involved a claim by 123 death row inmates, including petitioner, that the Florida Supreme Court had examined nonrecord information during its appellate review of their sentences. This Court, sitting en banc, held that no constitutional violation had occurred. Ford v. Strickland, 696 F.2d at 811. This panel is bound by that decision.

AFFIRMED.

JOHNSON, Circuit Judge, dissenting:

I dissent from the majority's disposition of this case on two issues: (1) petitioner's claim that he was denied an individualized sentencing hearing as required by the Eighth and Fourteenth Amendments to the Constitution and recognized in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and (2) petitioner's claim that the trial court's imposition of the death sentence after his rejection of a proffered guilty plea by the court violated his rights as guaranteed by the Eighth Amendment and the Fourteenth Amendment's Due Process Clause. Since I would hold that petitioner has clearly stated a claim on which relief may be granted on both of these grounds and that proof of these claims depends in part on facts outside the record before us, I would remand this case to the district court for an evidentiary hearing as to both claims. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Petitioner's sentencing hearing was held on February 4, 1977. At that time, the post-Furman 1972 Florida capital sentencing statute governing the sentencer's consideration of mitigating factors, Fla.Stat.Ann. § 921.141(2) and (6), had been interpreted in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), and Cooper v. State, 336 So.2d 1133 (Fla.1976). In Proffitt v. Florida, the Supreme Court in considering the constitutionality of Florida's capital sentencing scheme as a whole noted that, unlike the statute's limitation of the sentencer's consideration of aggravating factors to those listed in the statute, "[t]here is no such limiting language introducing the list of statutory mitigating factors." 428 U.S. at 250 n.8, 96 S.Ct. at 2965 n.8. Or, as the Court later stated in Lockett v. Ohio:

In Proffitt v. Florida, six Members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. . . . None of the statutes we sustained in

Gregg [428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859] and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor.

438 U.S. at 606, 607, 98 S.Ct. at 2965, 2966. Six days after the decision in *Proffitt v. Florida*, *Cooper v. State* was decided by the Florida Supreme Court. In *Cooper*, the Florida Supreme Court apparently held, in language quoted in full below, that Section 921.141 did limit the

As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be law abiding. Cooper has shown that by his conduct here. In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.

<sup>7</sup> The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist..." (emphasis added). This limitation

sentencer's consideration of mitigating factors to those listed in the statute. Later cases binding on this Court have so interpreted Cooper. Ford v. Strickland, 696 F.2d 804, 812 (11th Cir.1983) (en banc) ("Ford contends he cannot be faulted for failing to raise the issue . . . because Florida Supreme Court decisions decided prior to trial indicated only statutory mitigating circumstances could be considered. The court ruled explicitly to this effect two years after trial in Cooper v. State. . . . Lockett v. Ohio, . . . a direct reversal of this view, was not decided until two years later . . ."); Foster v. Strickland, 707 F.2d 1339, 1346 (11th Cir.1983); Proffitt v. Wainwright, 685 F.2d 1227, 1238 and n.18 (11th Cir.1982). Cooper was the controlling decision of Florida law in effect at the time of petitioner's sentencing trial.

Two years after the decision in Cooper and one year after petitioner's sentencing trial, Lockett v. Ohio, supra, was decided. In Lockett, the Supreme Court held that the limitation of a sentencer's consideration to an exclusive statutory list of mitigating factors violated the Eighth and Fourteenth Amendments. Two months later, in Songer v. State, 365 So.2d 696 (Fla.1978) (on rehearing), the Florida Supreme Court rejected a Lockett challenge to the statute based on Cooper. The court found that the Cooper language concerning the exclusivity of statutory mitigating factors was dicta and that "Cooper is not apropos to the problems addressed in Lockett." Id. at 700. The court held that its construction of Section 921.141(6) since enactment had been that "all relevant circumstances may be considered in mitigation, and that the factors listed in the statute merely indicate the principal factors to be considered." Id.

We held in State v. Dixon [283 So.2d 1 (Fla. 1973)] that the rules of evidence are to be relaxed in the sentencing hearing, but that evidence bearing no relevance to the issues was to be excluded. The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).7

is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under *Furman undisciplined* discretion is abhorrent whether operating for or against the death penalty.

<sup>336</sup> So.2d at 1139 (emphasis added) (footnotes omitted).

In light of this history, I agree with the majority that at the time of petitioner's sentencing trial, after Cooper but before the clarification in Songer, the statute was, at best, ambiguous: capable of both a constitutional construction in accordance with Lockett as not limiting the sentencer's consideration to statutory mitigating factors, as in Proffitt v. Florida, and an unconstitutional construction that the statutory list of mitigating factors was exclusive, as in Cooper. See Proffitt v. Wainwright, supra, at 1238 and nn. 18, 19. Stated differently, as the petitioner argues, at the time of his sentencing trial, the statute was unconstitutional due to its ambiguity.2

As with all but certain First Amendment attacks based on a statute's ambiguity, however, petitioner must also demonstrate that the unconstitutional interpretation of the statute was actually followed at his sentencing trial; that, in short, the statute was unconstitutional as applied to him. To meet this element of stating a claim on which relief may be granted, petitioner alleges that the unconstitutional Cooper interpretation of the statute affected his sentencing proceedings because his counsel reasonably relied on Cooper as the controlling statement of Florida law in his preparation and presentation at the sentencing trial. Unlike the majority, I cannot conclude based on this record that petitioner's allegations in support of his claim "conclusively show that the [petitioner

is] entitled to no relief," or that these allegations are so "palpably incredible . . . so patently frivolous or false" that summary dismissal is warranted. Blackledge v. Allison, supra, 431 U.S., at 73, 76, 97 S.Ct. at 1628, 1630. To the contrary, the lack of any evidentiary hearing in the state or district courts to develop a record by which we can evaluate this claim and the proffer of evidence supporting this claim by the petitioner in the district court demonstrate that the petitioner is entitled to an evidentiary hearing on the issue of whether the unconstitutional construction of the statute actually affected the

course of his sentencing proceeding.

In support of his motion for an evidentiary hearing in the district court, petitioner alleged that his trial counsel, Tabscott, would testify that at the time he represented petitioner at the sentencing trial he believed that Cooper limited the sentencer's consideration to statutory mitigating factors and that Tabscott would testify that he "focused upon the statutory mitigating circumstances in his pre-trial investigation and preparation as well as in his presentation of evidence and argument at trial." Petitioner proffered an affidavit by Tabscott in support of these allegations. In this affidavit, Tabscott states that "during my representation of Mr. Hitchcock, my perception was that the consideration of mitigating circumstances was limited to the factors enumerated in the statute."

Petitioner further alleged, and proffered evidence in support of his allegations, that significant evidence of nonstatutory mitigating factors could have been presented at his sentencing hearing "had Mr. Tabscott believed that the law permitted the presentation of such evidence." Petitioner proffered the testimony and report of a psychologist who had examined him as establishing the nonstatutory mitigating factors that his behavior in committing the crime was inconsistent with his established patterns of behavior and that he had great potential for rehabilita-

<sup>&</sup>lt;sup>2</sup> The majority misreads the Cooper/Lockett claims made by the petitioner. As both the briefs and the oral argument make clear, petitioner first claims that due to its ambiguity the statute was unconstitutional as applied to him and further that the unconstitutional interpretation of the statute deprived him of effective assistance of counsel by operation of state law. Petitioner then argues only in the alternative that if it was clear that the statute permitted the introduction of nonstatutory mitigating factors, his counsel was ineffective in failing to investigate and present such evidence. I address only the first of petitioner's claims, that the statute was unconstitutional as applied to him, and do not, as does the majority, read petitioner's argument simply as an ineffective assistance of counsel claim

tion.<sup>3</sup> Petitioner also proffered testimony and affidavits of various family members attesting his difficult childhood and his good character.

The record of petitioner's sentencing hearing does not contradict the affidavit of petitioner's counsel that he believed only statutory mitigating factors could be presented at his hearing. Nor does the record reveal that substantial nonstatutory mitigating evidence was in fact presented. Only one witness, the petitioner's brother, testified at the sentencing hearing as to circumstances that could arguably be identified as nonstatutory mitigating factors: the petitioner's father had died of cancer, petitioner's mother worked on a farm, and the witness had allowed petitioner to babysit his children. Further testimony from this witness that petitioner's habit of "sucking on" automotive gasoline seemed to affect him mentally was argued by counsel as a statutory psychological mitigating factor. The bulk of the argument by petitioner's counsel was an evaluation of whether the statutory mitigating factors did or did not apply in this case. Petitioner's counsel reminded the sentencing jury of earlier testimony concerning petitioner's background, but he did not argue this testimony as a mitigating factor, asking only that the jury consider it "for whatever purposes you may deem appropriate." In short, the slender evidence from the state sentencing hearing record that some mitigating factors not listed in the statute were, to a limited extent, before the sentencing jury does not conclusively establish that petitioner's counsel in fact believed that such evidence could be, and was, presented and fully argued to the jury as nonstatutory mitigating factors.

Nor does the precedent of this Court indicate that petitioner's proffer was insufficient to entitle him to an evidentiary hearing. Proffitt v. Wainwright, supra, rejected a claim of ineffective assistance of counsel based on an attorney's affidavit that he had relied on an interpretation of Florida law that precluded the presentation of non-statutory mitigating factors:

[T]he defense attorney's belief that he could not, under the Florida statute, introduce evidence of mitigating factors not listed in Fla. Stat. § 921.141(6) was entirely reasonable. His decision not to call witnesses at the penalty stage to testify about appellant's general character and background was therefore justifiable and fully within the sixth amendment standard of reasonably effective assistance.

685 F.2d at 1248. The petitioner in this case, unlike the petitioner in Proffitt, challenges the Florida statute as applied to him. As a necessary step in his argument that the statute was ambiguous and that the unconstitutional interpretation of the statute governed his sentencing hearing through his attorney's reliance on Cooper, petitioner claims that his attorney reasonably relied on Cooper. Proffitt, then, in fact supports petitioner's attack on the statute. In Ford v. Strickland, supra, this Court held that the jury instructions given at the defendant's sentencing hearing did not result in the jury's perceiving that it was limited only to the consideration of statutory mitigating factors because both the trial court and counsel did not so perceive the law. In Foster v. Strickland, supra, the Court held that no prejudice had been shown from the defendant's failure to object to similar jury instructions because the defendant did not proffer any nonstatutory mitigating evidence to support his claim. Neither Ford nor Foster speaks to the present case in which the petitioner has proffered both evidence that his counsel perceived Florida law to limit the presentation of mitigating evidence to those factors listed in the stat-

<sup>&</sup>lt;sup>3</sup> Contrary to the majority's suggestion, this evidence, although produced through a psychologist's evaluation does not also fall, within the statutory mitigating factor that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." Fla. Stat. Ann. § 921.141(4)(b).

ute and evidence that substantial nonstatutory mitigating evidence was available.

In sum, I would hold the evidence proffered by the petitioner to the district court sufficient to entitle him to an evidentiary hearing on his allegations that, but for his counsel's reasonable reliance on the Florida Supreme Court's interpretation of the statute as precluding the introduction of nonstatutory mitigating evidence, such evidence would have been investigated and presented at his sentencing hearing. Although the inference is clear from the affidavit and petitioner's allegations, I recognize that the proffered affidavit does not explicitly state this causal relationship between counsel's reliance on Cooper and the course of his sentencing hearing. This does not, however, as the majority seems to assume, require a summary dismissal of petitioner's claims, but rather it is in both law and logic further demonstration of the need for an evidentiary hearing in this case. We cannot conclusively determine from the evidence before us whether petitioner's allegations of this causal relationship are indeed fact. If, as petitioner alleges, his counsel's reliance on Cooper as limiting the sentencer's consideration to statutory mitigating factors precluded counsel from investigating or presenting available evidence of nonstatutory mitigating factors, then petitioner has demonstrated that the unconstitutional interpretation of the ambiguous statute did affect his sentencing hearing, and relief should be granted.

I would further hold that petitioner has stated a claim of constitutional deprivation through his allegations that, prior to trial, the trial court approved of the prosecution's offer of a plea agreement of life imprisonment, and thus the trial court at least implicitly agreed to impose life imprisonment as a sentence if petitioner were to accept this offer, and after trial the court sentenced petitioner to death without making written findings as to why before trial a life sentence was proper and after trial the death sentence was imposed.

Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), relied on by both the majority and the district court, does not apply to the present case. Bordenkircher involved the limited factual situation where a state prosecutor carried out a threat to reindict the defendant on a more serious charge if the defendant did not plead guilty. Bordenkircher did not involve either the court's participation in the plea bargaining process or the possible sentence of the death penalty. Both of these factors, present in this case, distinguish the proper analysis from that in Bordenkircher and demonstrate that petitioner has stated a claim of constitutional deprivation.

In North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), the Supreme Court held that a state court could not impose a greater sentence on a defendant after retrial following a successful appeal unless "the reasons for [its] doing so . . . affirmatively appear [in the record]." Id. at 726, 89 S.Ct. at 2081. In the absence of such record evidence, the chilling effect of an inference that the defendant was being punished for exercising his constitutionally protected right to appeal or collaterally attack his conviction was held to violate the Fourteenth Amendment's Due Process Clause.

Relying on the equally protected constitutional right to trial by jury, and the equally recognized principle that the "Constitution forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial," due to the chilling effect on the exercise of this right, Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981), the Ninth Circuit has held in noncapital cases that:

[O]nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the

defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty.

United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir. 1973).

Moreover, the Supreme Court has expressly recognized that the Eighth Amendment's heightened due process reliability requirement in capital cases applies with equal force to permissible plea bargaining practices. In United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Supreme Court invalidated the procedures of the Federal Kidnapping Act under which a defendant would receive a life sentence if he pleaded guilty but could receive a death sentence if he chose to stand trial. In Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978), the Supreme Court approved the practice of extending leniency for a guilty plea in noncapital cases, but expressly noted that "the death penalty, which is 'unique in its severity and irrevocability,' is not involved here." Id. at 217, 99 S.Ct. at 496 (quoting Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976)). Justice Stewart, the author of Bordenkircher, concurred in the result in Corbitt on the grounds that Jackson did not apply because the death penalty was not involved and Bordenkircher did not apply because it simply involved the prosecutor's acting within the adversary system and not a state statute as in Corbitt. 439 U.S. 226-28, 99 S.Ct. 501-02.

Finally, the Supreme Court has recognized the unique power of the death penalty to coerce guilty pleas and thus chill the exercise of the constitutionally protected right to trial by jury. In *Jackson*, the Court stated that, because "assertion of the right to jury trial may cost [a defendant] his life," the Federal Kidnapping Act impaired the exercise of this right. 390 U.S. at 572, 88 S.Ct. at 1211. The evil in the statute was "not that it neces-

sarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them." Id. at 583, 88 S.Ct. at 1217.

In light of this precedent, it is clear the Eighth Amendment's requirement that a "decision to impose the death sentence be, and appear to be, based on reason," Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977), is not met by a system in which the trial court tenders a life sentence as part of a plea bargain before trial and then imposes the death sentence without explanation after the defendant has exercised his right to stand trial. The inference that the defendant is being punished by the ultimate sanction for exercising his constitutionally protected right to trial is, without record evidence to the contrary, unacceptable. I would therefore hold that petitioner's allegations state a claim under the Eighth Amendment and the Fourteenth Amendment's Due Process Clause.

A transcript of the plea conference at which the alleged offer to accept a life sentence in return for a guilty plea was either tendered to defendant and his counsel or approved by the trial court is not a part of the record now before this Court. No evidentiary hearing to determine the accuracy of petitioner's crucial allegation that the trial court in fact approved such an offer has been held in either the state courts or the district court. Instead, the sole evidence before this Court on this issue are remarks made at petitioner's sentencing hearing, see majority opinion, supra, at note 2, which are ambiguous at best and are insufficient to evaluate the accuracy of petitioner's claim. I therefore would hold that petitioner is entitled to an evidentiary hearing in the district court on this issue.

<sup>4</sup> The warden-appellee argues that the Florida Supreme Court on direct appeal made historical findings of fact on this issue entitled to the statutory presumption of correctness under 28 U.S.C.A. § 2254(d). On direct appeal, the Florida Supreme Court rejected the petitioner's claim that "the trial court offered him a sentence of

life imprisonment in return for a plea of nolo contendere as charged" and thus that the trial court imposed the death sentence because he exercised his right to a jury trial. 413 So.2d at 746. The Florida Supreme Court concluded:

Hitchcock's version of the facts surrounding this point . . . is not supported. Rather, it appears from the record, as supplemented, that the judge agreed only to consider such an agreement if Hitchcock were to plead guilty. Because Hitchcock refused to consider a plea, the court never had to consider whether to accept the plea bargain. When defense counsel reminded the judge during sentencing proceedings of the plea negotiations, the judge responded, "there was never any understanding because your client didn't want to consider any plea."

Id.

Petitioner notes that the record before the Florida Supreme Court consisted solely of the remarks made during sentencing and was supplemented only by affidavits of both petitioner's counsel and the prosecutor. The affidavit of petitioner's counsel, executed contemporaneously with the trial proceedings, states: "Judge Paul indicated that he would accept a plea of nolo contendere as charged and that [petitioner] would be sentenced to life imprisonment." The prosecutor's affidavit is to the contrary: "Judge Paul indicated that he would consider [the State's] recommendation, should the . . . defendant actually plead guilty as charged." Petitioner also argued to the Florida Supreme Court that, should it find the record insufficient and the affidavits contradictory, it should remand to the state habeas court for an evidentiary hearing. Based on these facts, petitioner claims that the Florida Supreme Court's factfinding procedure \* \* \*

# ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.\*

#### BY THE COURT:

A member of this court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this court in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this court en banc with oral argument on a date hereafter to be fixed. The clerk will specify a briefing schedule for the filing of en banc briefs.

# UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

# No. 83-3578

JAMES ERNEST HITCHCOCK, PETITIONER-APPELLANT

v.

LOUIE L. WAINWRIGHT, RESPONDENT-APPELLEE

Aug. 28, 1985

Appeal from the United States District Court for the Middle District of Florida

#### OPINION

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.\*

RONEY, Circuit Judge:

This case was taken on rehearing en banc principally to consider two of several constitutional claims raised by petitioner James Ernest Hitchcock. He asserts (1) that at the time of his capital sentencing, Florida law unconstitutionally discouraged his attorney from investigat-

ing and presenting nonstatutory mitigating evidence, and (2) that the trial court improperly considered petitioner's refusal to plead guilty in imposing a death sentence. The district court denied all claims raised by Hitchcock without conducting an evidentiary hearing. We affirm.

In January 1977, Hitchcock was convicted and sentenced to death for the murder of his brother's thirteen-year-old stepdaughter. The Florida Supreme Court affirmed his conviction and sentence. Hitchcock v. State, 413 So.2d 741 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 960, 74 L.Ed.2d 213 (1982). The denial of Hitchcock's state post-conviction motion to vacate judgment and sentence was likewise affirmed. Hitchcock v. State, 432 So.2d 42 (Fla.1983). After his federal petition for habeas corpus was denied by the district court, Hitchcock raised five issues on appeal. The panel opinion, one judge dissenting on two issues, affirmed the denial of relief as to all issues. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir.1984), vacated for reh'g en banc, 745 F.2d 1348 (11th Cir.1985).

With respect to his claims on sufficiency of the evidence, arbitrariness of the death penalty in Florida, and the Brown issue decided in Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), we now reinstate the sections of the panel opinion denying relief. Although closely following the panel discussion, we set forth fully in the opinion for the en banc court the reasons for rejecting Hitchcock's other two claims.

# I. Restriction of Mitigating Evidence

The confusion in Florida law surrounding nonstatutory mitigating evidence in capital sentencing has been discussed at length in prior decisions of this Court. Hitchcock v. Wainwright, 745 F.2d 1332, 1335-37 (11th Cir. 1984); Ford v. Strickland, 696 F.2d 804, 813 (11th Cir. 1983) (en banc), cert. denied, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); Proffitt v. Wainwright, 685 F.2d 1227, 1238-39 (11th Cir.1982), cert. denied, —

<sup>\*</sup> Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision pursuant to 28 U.S.C.  $\S$  46(c).

U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983); see also Songer v. Wainwright, — U.S.—, 105 S.Ct. 817, 819-22, 83 L.Ed.2d 809, 812-14 (1985) (Brennan, J., dissenting from denial of certiorari). In summary, for six years after the Florida death penalty statute was reenacted in 1972, there was some ambiguity as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors enumerated in the statute. The opinions cited above set forth the manner in which this uncertainty first arose in State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974), and was exacerbated by Cooper v. State, 336 So.2d 1133 (Fla.1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). The confusion was finally alleviated in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct 2185, 60 L.Ed. 2d 1060 (1979), after the United States Supreme Court had ruled in Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record."

A number of Florida prisoners sentenced to death before Songer was decided have since sought constitutional relief, claiming that the confusion in Florida law inhibited investigation, presentation, and consideration of nonstatutory mitigating evidence at their capital sentencing. The basic legal problems have been addressed in a variety of contexts: as a Lockett challenge to the facial constitutionality of the death penalty statute itself as interpreted in Cooper by the Florida Supreme Court, see Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed. 2d 796 (1979); as a claim that counsel was ineffective in failing to investigate or present nonstatutory mitigating evidence, see Proffitt v. Wainwright, 685 F.2d 1227, 1248

(11th Cir.1982), cert. denied, — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983) and Songer v. Wainwright, 571 F.Supp. 1384, 1393-97 (M.D. Fla.1983), aff'd, 733 F.2d 788, 791 n.2 (11th Cir.1984), cert denied, — U.S. ----, 105 S.Ct. 817, 83 L.Ed.2d 809 (1985); as a challenge to jury instructions as restricting the scope of mitigating evidence to that enumerated in the statute, see Ford v. Strickland, 696 F.2d 804, 813 (11th Cir.) (en banc), cert. denied, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983); Foster v. Strickland, 707 F.2d 1339, 1346-47 (11th Cir.1983), cert. denied, — U.S. —, 104 S.Ct. 2375, 80 L.Ed.2d 847 (1984); and Songer v. Wainwright, 733 F.2d 788, 792 (11th Cir.1984); and as a claim arising under Lockett v. Ohio that Florida law as applied discouraged and prevented introduction of available nonstatutory mitigating evidence. See Hitchcock v. Wainwright, 745 F.2d 1332, 1335-37 (11th Cir.1984); see also Songer v. Wainwright, - U.S. -, 105 S.Ct. 817, 817, 83 L.Ed.2d 809, 810 (1985) (Brennan, J., dissenting from denial of certiorari).

To date, this Court has considered these claims on a case-by-case basis, evaluating the impact of Florida law on each individual petitioner's capital sentencing hearing. We now reaffirm that approach. The en banc Court has determined that an analysis should be made in each case presented to evaluate a petitioner's claim on the particular facts of the case. A court should consider the status of Florida's law on the date of sentencing, the record of the trial and sentencing, the jury instructions requested and given, post-trial affidavits or testimony of trial counsel and other witnesses, and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing. In some cases, full and fair consideration of the claim will necessitate an evidentiary hearing. Although generally an evidentiary hearing on the issue is preferable, in some cases, such as the one before us, the record will be sufficient to support a decision in the absence of an evidentiary hearing.

In the instant case, the district court dismissed this claim on the grounds that Florida law did not limit what evidence could be produced in mitigation at the penalty stage and that the record indicated petitioner's attorney did not think he was constrained by the statute.

The evidence proffered to the district court does not establish the right to constitutional relief. Although there was a proffer of evidence that the trial attorney may have been mistaken about Florida law, the record belies the argument that at the time of the case, the presentation to the jury would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

Petitioner submitted an affidavit of the attorney, a public defender, who represented him at trial and sentencing. The affidavit of the attorney is carefully written. It states that although the attorney does not have an independent recollection, he is of the opinion, upon reviewing the transcript, that during his representation of petitioner his perception was that consideration of mitigating circumstances was limited to the factors enumerated by the statute. It says he is aware of the current status of the case and that evidence of relevant mitigating circumstances was not investigated or presented in petitioner's sentencing trial. The affidavit does not indicate, however, that he would have done anything differently at that time.

At the sentencing hearing, petitioner's attorney called petitioner's brother, James, who testified about petitioner at the age of five or six, about his father's death, about the farm work of both the mother and the father hoeing and picking cotton in Arkansas, that there were seven children in the family, and that he left "Ernie" to babysit with the brother's small children. Other testimony relating to petitioner's character had come out at trial. Petitioner testified he left home when he was thirteen because he could not tolerate seeing his stepfather abuse his mother. His mother testified that he was a good child and he minded her. Three of his siblings told the jury he

was not a violent person. During closing argument the attorney referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner voluntarily turned himself in. Finally, he admonished the jury to "look at the overall picture. You are to consider everything together . . . consider the whole

picture, the whole ball of wax."

Petitioner has suggested several different pieces of evidence of nonstatutory mitigating circumstances which might have been presented. First, he argues that testimony by psychologists could have been introduced which would have corroborated lingering doubts about guilt and shown petitioner was an excellent candidate for rehabilitation. Such testimony would tend to establish his innocence, he says, by bringing out that he had coped with stressful situations throughout his life by retreating or escaping. There is no indication in this record, however, that the attorney at the time of sentencing would have followed this course even if he had known he could. Such matters are not judged from hindsight. Strickland v. Washington, 466 U.S. 668, —, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). It should be noted that mental and emotional conditions are statutorily permitted mitigating considerations. Fla.Stat.Ann. § 921.141 (6) (b). Petitioner has cited us no cases holding that the mere failure to investigate or produce psychological or psychiatric evidence renders a sentencing proceeding unconstitutional.

Petitioner argues that greater details as to his upbringing in an environment of extreme poverty, his solid character traits, devotion to hard work, willingness to contribute to the family's support, and respect for adults should have been presented as evidence of nonstatutory mitigating factors. All of this was developed, however, to some extent for the jury. As described above, elements of petitioner's character and other background information were testified to by petitioner's brother, sisters, and mother as well as by petitioner himself. Petitioner's trial counsel reminded the jury of these facts during closing argument in the penalty phase.

It thus appears that petitioner was not denied an individualized sentencing hearing.

# II. Life Sentence Offered for Guilty Plea— Death Sentence Imposed After Conviction.

Petitioner asserts that the state trial judge imposed the death sentence as punishment for petitioner's decision to go to trial rather than plead guilty. Petitioner alleged that the prosecutor and the judge together offered him a plea bargain which would exchange his plea of guilty for a life sentence. Petitioner declined the offer. After trial, the judge on the jury's recommendation sentenced petitioner to death. Petitioner argues his death sentence must be overturned because the trial judge's sentencing order did not explain why death became an appropriate penalty after trial.

The record is unclear as to whether the trial judge indicated he would approve a life sentence on guilty plea, or merely would consider it. We treat the case as if the defendant would have received a life sentence on a guilty plea.

Although the principle of law that petitioner argues would apply on retrial and resentencing after a successful appeal, North Carolina v. Pearce, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969); Blackledge v. Perry, 417 U.S. 21, 28-29, 94 S.Ct. 2098, 2102-03, 40 L.Ed.2d 628 (1974), it does not apply to the failure of a plea bargain. Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S.Ct. 663, 667, 54 L.Ed.2d 604 (1978). In the "give-and-take" of plea bargaining, the state may extend leniency to a defendant who pleads guilty foregoing his right to jury trial. Brady v. United States, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). Legis-

lative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas. Compare United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) with Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (statute valid when plea of non vult gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as much as the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. Cf. Corbitt, 439 U.S. at 224 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).

In criminal cases generally, sentencing after conviction following a failed plea bargain presents a different situation from sentencing on retrial after a reversal of a prior conviction or sentence. Upon a second conviction after a prior conviction has been set aside, a defendant stands in the same posture for sentencing as he did after his first conviction. Presumably the facts before the court for determination of the correct sentence would be the same in both instances. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a penalty for the defendant's challenging of his conviction. See Wasman v. United States, — U.S. — 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984).

A defendant who pleads guilty, however, is in a markedly different posture from a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation. Moreover, by pleading guilty a defendant confers a substantial benefit to the objectives of the criminal justice system:

the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain, from a defendant's point of view, is the opinion of avoiding a possibly harsher sentence after conviction at trial.

Absent a demonstration by the defendant of judicial vindictiveness or punitive action, a defendant may not complain simply because he received a heavier sentence after trial. Blackmon v. Wainwright, 608 F.2d 183 (5th Cir.1979), cert. denied, 449 U.S. 852, 101 S.Ct. 143, 66 L.Ed.2d 64 (1980). We have held that a mere allegation of discrepancy between a defendant's actual sentence and that which he would have received had he foregone trial to plead guilty does not invalidate the sentence. Smith v. Wainwright, 664 F.2d 1194, 1197 (11th Cir.1981).

In capital cases particularly, there is no merit to the argument that the sentencing judge should have set forth the reasons why the sentence after trial was greater than what would have been approved on a guilty plea. The precise reasons for a death sentence are required by Florida statute to be set forth by the sentencing judge. The possibility of a different sentence because the defendant pleads guilty does not run afoul of the require-

ment that the "decision to impose the death sentence be, and appear to be, based on reason." Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). In this case, the court imposed the death penalty only after fully considering the aggravating and mitigating circumstances and receiving the jury's recommendation of death. The procedure in Florida fully meets the Ninth Circuit's requirements that if a court participates in plea bargaining "the record must show that the court sentenced the defendant solely upon the facts of his personal history, and not as punishment for his refusal to plead guilty." United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir.), cert. denied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

A trial court which approved a sentence based on a plea bargain prior to trial need not, upon rejection of that offer and conviction at trial, restrict its sentence to that offered for the plea bargain, set forth reasons for harsher sentence, nor impose such sentence only for conduct occurring after the aborted plea bargaining.

The district court properly denied Hitchcock's petition for habeas corpus.

AFFIRMED.

JOHNSON, Circuit Judge, dissenting, joined by CLARK, Circuit Judge, and joined as to Part I by GODBOLD, Chief Judge, KRAVITCH and R. LANIER ANDERSON, III, Circuit Judges:

The district court denied habeas corpus relief to James Ernest Hitchcock without conducting an evidentiary hearing. The failure to conduct such a hearing should determine the outcome in this case, for two of the allegations of error raised by the petitioner are legally sufficient to require a grant of relief and the only real question is the truth of his factual allegations. We cannot at this point determine whether Hitchcock was convicted and sentenced in accordance with the Constitution, and

should therefore remand the case for fact-finding by the district court. Accordingly, I dissent.

# I. Cooper/Lockett claim

The petitioner in this case contends that Florida law at the time of his sentencing hearing was most reasonably interpreted to restrict the presentation of mitigating evidence in violation of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.E.2d 973 (1978), and that the interpretation of state law operated in his case to prevent him from presenting some mitigating evidence to the jury. The first half of this argument is virtually beyond dispute, while the second half can be properly evaluated only after an evidentiary hearing.

### A. State law at the time of Hitchcock's trial

As the majority concedes, a progression of events from the enactment of the post-Furman\* Florida death penalty statute in 1972 to the time of his sentencing trial in 1977 created the possibility that state law would restrict improperly the types of mitigating evidence that could be presented. Whether such restrictions actually affected any particular sentencing hearing during this time must be determined on the facts of each case, and Hitchcock's claim must be viewed in light of the fact that at the time of his sentencing trial in 1977 the confusion regarding state law was at its very height. Cf. Songer v. Wainwright, 769 F.2d 1488 (11th Cir.1985).

Defense counsel, prosecutor and trial judge were all interpreting the statute in light of erroneous or misleading language in the statute itself, compare FLA.STAT. 921.141(2), (3) (describing task of jury and sentencing judge as balancing of aggravating circumstances against mitigating circumstances "as enumerated" in statute)

with FLA.STAT. 921.141(5), (6) (aggravating circumstances "shall be limited" to eight categories, while mitigating circumstances "shall be" those contained in listed categories), and decisions of the Florida Supreme Court, including State v. Dixon, 283 So.2d 1, 7 (Fla.1973) (statute creates "a system whereby the possible aggravating and mitigating circumstances are defined"), and Cooper v. State, 336 So.2d 1133, 1139 (Fla.1976) (upholding trial court's decision to exclude evidence on relevance grounds because proffered evidence bore no relevance to issue involved at sentencing proceeding; sole issue in capital sentencing "is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding.") (Emphasis supplied). See id. at 1139 n. 7. The relevant law at this time has been described in greater detail elsewhere, see Songer v. Wainwright, ----U.S. ---, 105 S.Ct. 817, 819-22, 83 L.Ed.2d 809, 812-14 (1985) (Brennan, J., dissenting from denial of certiorari). Here it will suffice to note that the erroneous or confusing signals regarding mitigating evidence that were operating in this case were more plentiful than at any time before or since.

The confusion affected cases tried during this time other than this one. In Songer v. State, 365 So.2d 696 (Fla.1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), the court cited several cases in which it had affirmed sentences imposed after trial courts had allowed non-statutory mitigating circumstances into evidence. While it is possible to question the accuracy of each of the seven citations since they arguably involved statutory rather than non-statutory mitigating circumstances, Hitchcock does not claim that all Florida courts followed an unconstitutional interpretation of state law. Rather, he claims that the improperly restrictive view was possible under state law and was followed in a number of cases, including his own. Several

<sup>\*</sup> Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

facts tend to support his contention. First, none of the seven cases explicitly state in holding or dicta that a trial court may consider mitigating evidence outside the statute. Second, during the time that defendants in some cases were perhaps proffering non-statutory evidence, the Florida Supreme Court appeared to reaffirm in other cases the restrictive interpretation of Cooper. For instance, in Gibson v. State, 351 So.2d 948, 951-52 (Fla. 1977), the court found no mitigating circumstances present at all and simply recited the lower court's findings concerning the absence of statutory mitigation. See also Perry v. State, 395 So.2d 170, 174 (Fla.1981) (in trial before Songer, trial judge relied on Cooper and precluded evidence of non-statutory factors).

The possibility of an unconstitutionally restrictive application of the statute has been recognized by almost every federal appellate decision mentioning the issue. Spaziano v. Florida, — U.S. —, 104 S.Ct. 3154, 3158 n. 4, 82 L.Ed.2d 340 (1984) (Florida statute in effect in 1976 required consideration of only statutory mitigating factors); Songer v. Wainwright, 769 F.2d 1488 at 1489 (11th Cir.1985); Foster v. Strickland, 707 F.2d 1339, 1346 (11th Cir. 1983) (Cooper in direct conflict with Lockett); Ford v. Strickland, 696 F.2d 804, 812 (11th Cir.), cert. denied, — U.S. —, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983) (same); Proffitt v. Wainwright, 685 F.2d 1227, 1238 & nn. 18-19, 1248 (11th Cir.1982), cert. denied, — U.S. —, 104 S.Ct. 508, 78 L.Ed.2d 697 (1983) (Florida law in flux, reasonable to interpret as limiting mitigating evidence to statutory categories); but see Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979) (statute on its face does not improperly restrict use of mitigating circumstances). Thus, Hitchcock has successfully proven the first half of his argument, to wit, Florida law in February 1977 was highly susceptible to an interpretation that violated Lockett v. Ohio.

# B. Effect of Florida law in Hitchcock's case

The petition for habeas corpus in this case forthrightly states that Hitchcock's trial counsel, Tabscott, believed that Florida law prohibited him from introducing mitigating evidence falling outside the confines of the statutory list. It also alleges that this understanding of state law directly caused him to pass over critical pieces of

mitigating evidence.

The district court summarily dismissed the petition under Rule 4 of the Rules Governing Section 2254 Cases, without an evidentiary hearing. Under Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977), summary dismissal is proper only under limited circumstances. The majority in this case has necessarily concluded, therefore, that proof of the claim does not depend upon facts outside the record or that the allegations in the petition are "palpably incredible" or "patently frivolous or false." Id. at 76, 97 S.Ct. at 1630. None of those conditions are present in this case.

The best factual support for the factual allegations in the petition appears in the affidavit of Tabscott stating that at the time of trial he believed that non-statutory mitigating factors were inadmissible. The majority correctly notes that this affidavit leaves many unanswered questions regarding Tabscott's understanding of state law at the time of sentencing and the effect that state law had on his conduct of the defense. No court has made findings of fact regarding Tabscott's understanding of state law. The existing record does not reveal whether and how Tabscott acted on his alleged beliefs regarding the restrictions of state law and there has been no evidentiary hearing regarding this matter, although the Florida Supreme Court stated in Hitchcock's direct appeal

<sup>&</sup>lt;sup>1</sup> Blackledge also provides for summary dismissal when the petitioner has stated no claim upon which relief can be granted. The majority does not hold that Hitchcock's claim is insufficient as a matter of law.

that the trial judge had not erroneously limited the types of mitigating evidence presented to the jury because "the defense itself chose to limit that presentation." 413 So.2d at 748. The extent to which the affidavit falls short of proving the allegations of the petition only underscores the necessity for an evidentiary hearing.

The truth of Hitchcock's claim is also supported, but not established, by the existence of several pieces of evidence that could have been investigated and introduced at his trial if his attorney had not held a restrictive view of the statute. He describes extensive testimony that he could have elicited from family members and a law enforcement officer regarding the difficult circumstances of his childhood and his good prospects for rehabilitation. He also proffered before the district court the testimony of a psychologist who had examined Hitchcock. His testimony related to the lingering possibility of Hitchcock's innocence (attacking the victim in a time of stress would have been an uncharacteristic response for Hitchcock) and to the possibility of rehabilitation.<sup>2</sup>

On the other hand, Hitchcock did present at the sentencing trial the testimony of his brother. The primary purpose of the testimony was to substantiate the existence of a statutory mitigating circumstance: substantial impairment of his ability to appreciate the criminality of his actions. To this end, the brother testified that Hitchcock had "sucked gas" as a child and that as a result his mind "wandered." The brother also related to the jury in

brief fashion (two transcript pages) that Hitchcock had grown up on a farm, that his father had died of cancer, and that he had served as babysitter for several family members. These facts were not statutory mitigating evidence; yet Tabscott elicited the testimony only as background to the brother's testimony regarding the statutory factor, and did not stress it in closing argument or characterize it as a mitigating factor that could enter into the jury's formal balancing process. He stated that the jury should consider the background information "for whatever purposes you may deem appropriate." Tabscott also referred in passing to the evidence of Hitchcock's character presented earlier during the guilt-innocence trial. At the close of his argument, he made the statement that the jury should consider "everything together," although it is far from clear whether he meant by this statement that the jury should consider all statutory and non-statutory mitigating evidence or simply that they should weigh in whatever way they saw fit the mitigating evidence that the law permitted them to consider.

The preceding overview of the evidence presented at sentencing confirms that some evidence not strictly related to statutory mitigating factors was placed before the jury. The question is whether this renders "palpably incredible" or "patently false" Hitchcock's allegation that state law restricted the presentation of mitigating evidence. The only reasonable conclusion is that it does not.

The opinion in Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978), states that the sentencer must be able to hear any mitigating evidence relating to the defendant's character or record or the circumstances of the offense, not just some evidence outside the bounds of a statutory catalogue. It should not matter whether the restriction of mitigating evidence is a complete failure to mention the evidence or the failure to develop it fully and incorporate it into the defense. The issue to be resolved in an evidentiary hearing would be causation rather than the type of restriction involved:

<sup>&</sup>lt;sup>2</sup> The majority makes reference to the statutory mitigating circumstance involving mental and emotional conditions. These do not permit the inference, however, that state law could not have limited the presentation of available evidence. First, much of the available but unpresented evidence had no connection with mental and emotional conditions. Second, the testimony of the psychologist would not fit under any of the statutory mitigating circumstances, for they refer to an "extreme mental or emotional disturbance" and to "substantial" impairment of the capacity to appreciate the criminality of one's conduct or to conform conduct to the requirements of law. Fla.Stat. § 921.141(6)(b), (f).

Did state law really cause counsel to restrict the presentation of mitigating evidence?

A lawyer might believe that state law prohibits the use of non-statutory mitigating evidence and could still introduce some evidence of that type and make passing reference to it in the belief that it would not provoke an objection so long as the reference is brief and unimportant. Similarly, a lawyer may feel free to mention eviduce during closing argument that was adduced during the guilt-innocence trial, in the belief that the restrictions of state law apply primarily to the introduction of evidence at sentencing and do not place such stringent limits on closing arguments. Each of these explanations is consistent with the record and with each of the allegations of the petition; none of them are palpably incredible or patently false.

The majority's willingness to assume no causal link between Tabscott's interpretation of state law and his presentation of the defense stands in marked contrast to the court's recent decision in Songer v. Wainwright, 769 F.2d 1488 at 1489 (11th Cir.1985). In that case the court was confronted with evidence that a trial judge had believed that state law prohibited him from considering non-statutory mitigating evidence as he reached a decision regarding the appropriate sentence. The en banc court granted habeas corpus relief despite the lack of conclusive evidence regarding a causal link between the judge's beliefs and the sentence imposed, for it was not clear just what mitigating evidence the trial court had refused to consider as a result of his statutory interpretation. Songer should demonstrate that once a petitioner establishes that a restrictive interpretation of state law could have limited the type of mitigating evidence presented to or considered by the sentencer, incomplete evidence of a causal link between the operation of state law and the mitigating evidence actually considered or presented will not defeat the claim. Hitchcock is entitled to

an evidentiary hearing at least as clearly as Songer deserved habeas corpus relief.

In sum, the truth of the factual allegations in the petition remains an open question that should be answered in an evidentiary hearing. Hence it is not proper to deny habeas corpus relief on this claim at this stage of the proceedings.

# II. Plea Negotiations

Driving a pretrial conference, the state court judge allegedly told Hitchcock's lawyer that he would impose a life sentence if the defendant pleaded nolo contendere, an offer that Hitchcock refused. No transcript of this conference was ever made but Hitchcock's attorney executed a contemporaneous affidavit documenting the refused offer. Hitchcock claims that the death sentence was imposed upon him as punishment for his decision to reject this plea offer by the trial court. The death sentence, he argues, was an improper burden on his right to a jury trial.

In order to decide whether there is a need for further factfinding, it is necessary to determine (1) whether, assuming Hitchcock's allegations are true, he has stated claim upon which relief can be granted, (2) whether the state court's factual findings on this matter are sufficient and correct.

# A. Sufficiency of claim

The majority assumes that the facts were just as Hitchcock alleged: the trial court and the prosecutor offered in conference before trial to accept from Hitchcock a plea of nolo contendere in exchange for a life sentence, an offer which Hitchcock refused. The same trial court imposed the death sentence on Hitchcock without stating on the record the reasons for increasing the punishment from life imprisonment. The majority then holds that these facts are insufficient to state a basis for relief.

Normally the initiation and breakdown of plea negotiations would not prevent the court from imposing a sentence heavier than the one originally offered. Under Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), a prosecutor may in the give-and-take of plea bargaining make an offer and then later seek a more severe punishment. But this was no ordinary breakdown in bargaining, for two reasons. First, the court became involved in the negotiations; second, the sentence imposed was death.

The fact that the court itself offered the life sentence to Hitchcock makes this case similar to North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), which held that a state court could not impose a greater sentence on a defendant after retrial following a successful appeal unless the reasons for doing so affirmatively appeared on the record. Any other result would imply that a defendant was being punished for exercising the constitutional right to appeal or to attack collaterally a conviction.

The involvement of the trial court was important to the finding of a due process violation in Pearce: "It is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice." 395 U.S. at 724, 89 S.Ct. at 2080 (quoting Worcester v. Commissioner, 370 F.2d 713, 718 (1st Cir.1966). While Pearce did involve sentencing at retrial rather than a first trial, the right to stand trial in the first instance is no less fundamental than the right to appeal that was involved in Pearce, and the mechanism for burdening the defendant's right carries the same appearance of impropriety whenever the court brings its coercive power to bear in negotiations. Indeed, the Ninth Circuit has found the analogy between the two situations persuasive enough to construct a general constitutional rule against judicial involvement in plea negotiations: "Once it appears on the record that the court has taken a hand in plea bargaining, that a tentative sentence has

been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty." United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948, 93 S.Ct. 1924, 36 L.Ed.2d 409 (1973).

Such an application of *Pearce* might not be constitutionally mandated; it is certainly unnecessary here. Disclosure of reasons for enhanced sentences in all cases of judicial involvement in plea negotiations might not be constitutionally required because, as the majority points out, vindictiveness is more likely to motivate harsher sentences after appeal and retrial than after rejection of a plea bargain: in the latter case, the proof at trial is available to explain the enhanced sentence. Yet Hitchcock's case does not call for a constitutional rule applying to all judicial involvement in plea negotiations. The fact of judicial involvement in plea negotiations is joined in this case by the fact that the enhanced sentence is the sentence of death.

The majority's attempt to address the problem of judicial involvement in the plea bargaining process completely ignores the peculiarly coercive impact of a threatened death penalty. It is true, as the majority states, that prosecutors may participate in plea bargaining, Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), and legislators may within certain limits create statutes that reward defendants for foregoing trial, Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). Yet legislatures are restricted in their use of the death penalty to induce guilty pleas. For instance, in United States v. Jackson, 390

<sup>&</sup>lt;sup>3</sup> On the other hand, Supreme Court precedent certainly does not foreclose the *Stockwell* rule. *Bordenkircher* involved negotiations between a prosecutor and a defendant, parties of roughly equal strength, whereas the participation of the court is more markedly coercive to the defendant. The due process clause should come into play in cases posing the greatest risk of coercion, including those cases where judicial involvement is greatest.

U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the Court invalidated the procedures of the Federal Kidnapping Act under which a defendant would receive a life sentence if he plead guilty but could receive a death sentence if he chose trial. The Court stated that where the assertion of the right to a jury trial could cost a defendant his life, the statute "needlessly encourages" guilty pleas. And in Corbitt v. New Jersey, 439 U.S. 212, 217, 99 S.Ct. 492, 496, 58 L.Ed.2d 466 (1978), the Court approved a statute extending leniency in return for a guilty plea in non-capital cases, but noted that "the death penalty, which is unique in its severity and irrevocability" was not involved. The same limits applicable to legislative use of the death penalty threat as an incentive to defendants should apply with equal force to judges.

Moreover, the unusually coercive power of the threat of a death sentence is heightened further when the threat comes directly from the judge, who plays a critical and sometimes decisive role in the capital sentencing process. Judges are not limited in their power to punish a defendant for insisting on the right to trial by weighing that fact in determining the sentence as prosecutors and legislators are. Prosecutors do not have the power themselves to determine sentence, and the legislature must pass general legislation without singling out particular defendants. The particularly sensitive and coercive role of the judge in the defendant's decision to plead guilty has been often noted in the context of Fed.R.Crim.P. 11. See United States v. Adams, 634 F.2d 830 (5th Cir. 1981). The majority's equation of legislators, prosecutors and judges does not account for the uniquely coercive power held by judges.

Assuming, then, that the judge in this case did offer a reduced risk of receiving the death penalty in order to induce a plea of guilty, this case involves the confluence of two coercive factors that have been limited by the Constitution in other contexts. It would be most in keeping with the due process limitations set forth in *Pearce*, *Jack*-

son, and Corbitt to restrict the participation of courts in plea-bargaining in capital cases. Whether those restrictions took the form of an absolute prohibition or a requirement that the reasons for the imposition of the death sentence despite the earlier offer of life appear on the record, Hitchcock would have stated a claim.

### B. State court factfinding

Before the trial judge sentenced Hitchcock, his attorney made a statement to the court on his behalf. At one point during the remarks, the attorney referred to the court's involvement in an earlier plea negotiation:

MR. TABSCOTT: I would also remind the Court that prior to trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence upon that plea. I have nothing further.

THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding, because your client didn't want to consider any plea.

MR. TABSCOTT: That plea was offered to him by the State and the Court, however. And, it is true he declined to enter that plea.

This is the entire factual record before this court relating to Hitchcock's claim. When this claim was pressed before the Florida Supreme Court, the record also contained an affidavit completed by Tabscott at the time of the plea offer, stating that "Judge Paul indicated that he would accept a plea of nolo contendere as charged and that the Appellant would be sentenced to life imprisonment." The prosecutor completed an affidavit three years after the sentencing that contradicted Tabscott's version: "Judge Paul indicated that he would consider [the State's] recommendation, should the . . . defendant actually plead guilty as charged."

The Florida Supreme Court ultimately rejected Hitch-cock's claim by making a factual finding. It stated that

"the judge agreed only to consider such an agreement if Hitchcock were to plead guilty . . . . There is nothing in the record even hinting that the trial court imposed the death penalty because Hitchcock chose to have a jury trial." 413 So.2d at 746.

The warden now contends that this is a factual finding entitled to the presumption of correctness of 28 U.S.C.A. § 2254(d). Of course, the statement that "the judge agreed only to consider such an agreement if Hitchcock were to plead guilty" can only be construed as finding of historical fact, not a legal conclusion. But the Florida Supreme Court reached its findings by reviewing conflicting affidavits and ambiguous statements in the trial transcript. It did not remand for an evidentiary hearing despite the availability of the affiants. Moreover, the finding reached by the court relied exclusively on the affidavit completed years after the event and ignored the affidavit created at the time of the plea offer. The court also made a logical jump from the trial court's statement that "there was no understanding" to the conclusion that the trial court never had to "consider" the offer. The trial court's statement could also have meant that it considered an offer and extended the offer, which was then rejected by the defendant.

Under these circumstances, the Florida Supreme Court cannot be said to have reached its findings of fact after a full and fair hearing, 28 U.S.C.A. § 2254(d)(2), and the finding was not supported by the record as a whole, 28 U.S.C.A. § 2254(d)(8). Thus, the statutory presumption of correctness does not apply. The district court should be ordered to hold an evidentiary hearing to resolve the conflict in the existing record and determine whether the trial court attempted to induce Hitchcock to plead guilty by threatening him with an increased chance of receiving the death penalty if he went to trial. I therefore dissent from the majority's holding that denies relief to Hitchcock before the facts relevant to his adequate legal claim have been developed.

# UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

No. 83-3578

JAMES ERNEST HITCHCOCK, PETITIONER-APPELLANT

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, RESPONDENT-APPELLEE

Nov. 19, 1985

# ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge.\*

# PER CURIAM:

This case was heard en banc. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir.1985).

A petition for rehearing has been filed seeking rehearing of that decision. When the *en banc* court has decided a case, and rehearing of that decision is sought, the petition will be treated as a F.R.A.P. Rule 40 Petition for

<sup>\*</sup>Circuit Judge Joseph W. Hatchett, having recused himself, did not participate in this decision. Senior Circuit Judge Lewis R. Morgan elected to participate in this decision, pursuant to 28 U.S.C.A. § 46(c).

Rehearing, addressed to all judges who sat on the *en banc* court. The standards for granting rehearing under Rule 40 will be applied in consideration of the petition.

Once the case is taken en banc, the petition for rehearing need not meet the standards required for the granting of rehearing en banc under F.R.A.P. Rule 35. A senior judge who sat with the en banc court on the decision of the case, pursuant to 28 U.S.C.A. § 46(c), shall participate in the consideration of such petition.

The petition for rehearing in this case is DENIED.

GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, HENDERSON, ANDERSON and CLARK, Circuit Judges, and MORGAN, Senior Circuit Judge concur in this opinion.

JOHNSON, Circuit Judge, dissenting, in which KRA-VITCH, Circuit Judge joins:

Petitioner has asked for a rehearing en banc of the decision of the en banc court. The majority holds that this petition for rehearing will be treated as a F.R.A.P. Rule 40 Petition for Rehearing. In consequence, the petition does not have to meet the standards required for the granting of rehearing en banc under F.R.A.P. Rule 35, and consideration of the petition is not limited to judges in regular active service. This action allows a senior circuit judge, who participated in the en banc decision, to also participate in the consideration of the petition for rehearing en banc.

F.R.A.P. Rule 40, which specifies the procedures to be followed in petitioning for rehearing, says that the petition "shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended. . . ." The focus of the petition for rehearing is thus to enable the court to correct its mistakes. The petition is addressed to the three-judge panel which has decided the case. This Cir-

cuit does not limit consideration of such petitions to judges in regular active service.

In contrast, F.R.A.P. Rule 35 states that rehearings of the court of appeals en banc are "not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Participation in the decision of whether to rehear a case en banc is limited to those "circuit judges who are in regular active service." F.R.A.P. Rule 35.

The Supreme Court has held that, although a senior circuit judge who participated in the original panel that decided a case can participate in the en banc rehearing of that case, no senior circuit judge can participate in any decision of whether or not to grant an en banc rehearing of a case. Moody v. Albemarle Paper Co., 417 U.S. 622, 94 S.Ct. 2513, 41 L.Ed.2d 358 (1974). The basis of the Court's decision was that Congress has explicitly vested the power to decide whether to rehear a case en banc in the "circuit judges of the circuit who are in regular active service." Id. at 627, 94 S.Ct. at 2516. The Court held that Congress appeared to have contemplated that the decision to rehear a case en banc "is essentially a policy decision of judicial administration" that requires the "intimate and current working knowledge" of the circuit possessed by judges in regular active service. Id. at 626-27, 94 S.Ct. at 2516.

The rationale for enabling senior circuit judges to participate in the decision of whether to grant a rehearing en banc in a case just decided by the en banc court is that such a rehearing would be simply to correct mistakes; the policy decision to rehear the case en banc would already have been made. Whether or not this rationale is sound, it conflicts with Congress' express prohibition on senior circuit judges participating in the decision to rehear a case en banc. Id. at 626-27, 94 S.Ct. at 2516-17; F.R.A.P. Rule 35. By its plain language,

this prohibition covers the decision of whether to hear "an appeal or other proceeding" before the en banc court. F.R.A.P. Rule 35. Since an en banc decision falls within the meaning of "an appeal or other proceeding," the decision of whether to rehear an en banc decision before the en banc court has been expressly limited to judges in regular active service.

I respectfully dissent.

### SUPREME COURT OF THE UNITED STATES

No. 85-6756

JAMES ERNEST HITCHCOCK, PETITIONER

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections

# ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions I, II and IV presented by the petition.

June 9, 1986

AUG 23 1988

JOSEPH F. SPANIOL, JR.

No. 85-6756

#### IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST HITCHCOCK,

Petitioner,

V.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

# BRIEF FOR PETITIONER

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
CRAIG S. BARNARD\*
Chief Assistant Public Defender
RICHARD H. BURR III
Assistant Public Defender
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150
Counsel for Petitioner
\*Attorney of Record

#### QUESTIONS PRESENTED

- 1. Where Mr. Hitchcock alleged that he was sentenced to death in violation of the Eighth and Fourteenth Amendments by the operation of Florida's pre-Lockett capital sentencing statute which enforced a "mandatory limitation" that only those mitigating circumstances "enumerated" in the statute could be considered, can the sua sponte summary dismissal of his claim be upheld?
- 2. Can the claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida be summarily dismissed as "wholly incredible" when the statistical analysis proffered in support of the claim has shown a large race-based disparity, and to a significant extent, has eliminated the most common nondiscriminatory reasons for it?

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### CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 770 F.2d 1514 (11th Cir. 1985) (en banc), and is set out at pages 120-142 of the Joint Appendix (JA). The opinion denying rehearing is reported at 777 F.2d 628 (11th Cir. 1985). JA 143-146. The panel opinion of the court of appeals is reported at 745 F.2d 1332 (11th Cir. 1985) and is set out at JA 89-118, together with the order granting rehearing en banc, JA 119. The Order and Memorandum of Decision by the United States District Court, Middle District of Florida, are unreported. JA 72-88.

#### JURISDICTION

The judgment and opinion of the Court of Appeals were filed on August 28, 1985, rehearing denied, November 19, 1985. Thereafter, Justice Powell entered an order extending the time within which to file the petition for writ of certiorari to and including April 18, 1986. The petition was filed on April 18, 1986 and certiorari was granted on June 9, 1986. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. It also involves Sections 921.141 Florida Statutes (1975) and the amended statute, Sections 921.141 (2), (3) Florida Statutes (1979). The text of these provisions are set out in Appendix A.

#### STATEMENT OF THE CASE

### A. Course Of Prior Proceedings

Mr. Hitchcock was charged by indictment with first degree murder in connection with the death of Cynthia Driggers on July 31, 1976. After a brief hearing in which Mr. Hitchcock declined an opportunity to enter a plea of nolo contendere and be sentenced to life imprisonment, he proceeded to a jury trial and was convicted of first degree murder, in January, 1977, in Orange County, Florida. A capital penalty trial was held in February, the jury returned a sentencing verdict of death, and a week later the judge sentenced Mr. Hitchcock to death. The

conviction and sentence were affirmed on direct appeal. *Hitch-cock* v. *State*, 413 So.2d 741 (Fla.), *cert. denied*, 459 U.S. 960 (1982).

After completion of executive clemency proceedings, Mr. Hitchcock filed a motion for post-conviction relief in the state trial court pursuant to Fla.R.Crim.P. 3.850. He also filed pleadings requesting a stay of execution, and expenses for expert and lay witnesses. The motion was denied without an evidentiary hearing and a week later the Florida Supreme Court affirmed that denial. Hitchcock v. State, 432 So.2d 42 (Fla. 1983).

Mr. Hitchcock then filed his petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. Shortly thereafter, he filed motions for leave to amend the habeas petition, R 843, for expenses of witnesses and discovery, JA 30, and for an evidentiary hearing, JA 38. The motion for leave to amend the habeas petition was granted. The district court reserved ruling on all of the other motions, except the motion for evidentiary hearing, which it indicated would be granted. See JA 71; R VIII 53-63. However, the district court sua sponte entered an order summarily dismissing Mr. Hitchcock's petition for writ of habeas corpus pursuant to Rule 4, Rules Governing Section 2254 Cases in the United States District Courts. JA 72.

A divided panel of the Eleventh Circuit Court of Appeals affirmed. 745 F.2d 1332 (11th Cir. 1984); JA 89. Mr. Hitchcock's suggestion for rehearing en banc was granted 745 F.2d at 1348; JA 119. The en banc court, by a seven to five margin, reinstated the panel's judgment. 770 F.2d 1514 (11th Cir. 1985); JA 120. Rehearing was denied. 777 F.2d 628 (11th Cir. 1985); JA 143.

#### B. Material Facts: Offense

The panel opinion of the court of appeals briefly summarized the facts concerning the offense:

Thirteen-year-old Cynthia Driggers was murdered by strangulation on July 31, 1976. Her body was recovered later that same day. An autopsy revealed that Drigger's hymen had been recently lacerated and that sperm was present in her vagina. Her face had cuts and bruises in the vicinity of the eyes. On August 4, 1976, petitioner confessed to the murder. He claimed that he and the victim had consensual sexual relations and he killed her when she became upset afterward and threatened to tell her parents. At trial, petitioner changed his story. He testified his brother, Richard, the girl's stepfather, discovered Cynthia and him having intercourse and reacted by strangling the girl.

745 F.2d at 1334; JA 90.1 The offense occurred in Richard's house where James Hitchcock was also living. In the guilt-innocence trial, Mr. Hitchcock had attempted to present evidence regarding his family history in order to establish that his brother, Richard, was the more likely person to have committed the offense.<sup>2</sup>

In the sentencing trial, which followed thereafter, the state presented no additional testimony, TAS 6, and the defense presented, James "Harold" Hitchcock, another brother of petitioner, to establish the statutory mitigating circumstance regarding mental condition (Fla. Stat. § 921. 141(6)(b)). Harold testified that petitioner had a habit of "sucking on gas" from automobiles when he was five or six years old, which caused him to "pass out" once; after that his "mind wandered." TAS 7-8. He also said that they had come from a family with seven children, which earned its livelihood by picking cotton, TAS

¹ The following symbols will be used to refer to the record in the court below. "R" refers to the record on appeal filed in the court of appeals. The portions of the record of the state court proceedings contained as exhibits in the Record are referred to by the following designations: "T" denotes the transcript of the trial in state court; "TR" designates the record on direct appeal in the Florida Supreme Court; "TAS" refers to the transcript of the advisory sentencing proceedings; and "TS" denotes the transcript of the imposition of the sentence by the state judge.

<sup>&</sup>lt;sup>2</sup> Most of this evidence was excluded. For example, the prosecutor's objections were sustained to questions regarding Mr. Hitchcock's behavior with children, T 732, 742, 743, 745, to questions regarding his father's death, T 736, 737, 741, 747, and to all questions regarding Richard's violent character, T 737, 741, 745, 748, 778. Mr. Hitchcock was prevented from testifying about his childhood family life. T 775. The only evidence that did come out, did so during Mr. Hitchcock's testimony in an effort to show why he falsely confessed to protect Richard—the fact that he left home at 13, T 773, and that his father died when he was six years old. T 775.

9-10, their father had died of cancer, TAS 8-9, and that petitioner had been close to Harold's children, TAS 10.

Thereafter, the jury recommended that the judge impose a death sentence, TAS 63, and he did. TS 7-8. In support of the sentence the judge found three statutory aggravating circumstances<sup>3</sup> and one statutory mitigating circumstance.<sup>4</sup>

#### C. Material Facts: Habeas Corpus

The facts pertinent to the issues-at-bar will be discussed in the argument, infra. Briefly, however, in support of his claims regarding the restriction upon consideration of mitigating factors, Mr. Hitchcock presented detailed allegations with regard to the facts on the face of the trial record, the status of Florida law, defense counsel's conduct of Mr. Hitchcock's defense under the view that he was restricted in the presentation and argument of mitigating evidence by the Florida statute, and the specific mitigating evidence that would otherwise have been available for presentation at the time. With regard to the discriminatory application of the death penalty, Mr. Hitchcock proffered two unpublished statistical studies that were available at the time of the filing of the habeas corpus petition. When it became available, Mr. Hitchcock supplemented this proffer with a pre-publication draft of a study conducted by Protessors Samuel Gross and Robert Mauro. Since the district court summarily dismissed the petition there was no evidentiary development of the facts.

#### SUMMARY OF THE ARGUMENT

1. In 1972 Florida enacted a capital sentencing statute that confined consideration of mitigating circumstances to a narrow statutory list. See, e.g., Cooper v. State, 336 So.2d 1133, 1139

(Fla. 1976) (holding the statutory language was clear in using "words of mandatory limitation" to confine consideration to a nonexpandable "list" of mitigating factors, and thus "other matters have no place in [the capital sentencing] proceeding"). Accordingly, though on its face the Florida statute may not have clearly restricted consideration of mitigating factors at the time of Proffitt v. Florida, 428 U.S. 242 (1976), in its operation the statute clearly confined consideration of mitigating factors in precisely the same manner as the Ohio statute struck down in Lockett. It was not until after Lockett that another view was recognized. Mr. Hitchcock's trial occurred after the Cooper decision but before Lockett. The face of the state court record demonstrates that his sentencing trial was affected, for all parties followed the "mandatory limitation" of the statute. Beyond the record, Mr. Hitchcock alleged that his lawyer, in reasonable reliance upon the statute's limitation, forewent substantial investigation, presentation and argument of compelling available nonstatutory mitigating evidence, but no hearing to permit him to prove his claim has ever been held. Summary dismissal of this claim was erroneous, for his allegations show that Mr. Hitchcock was denied what the Eighth Amendment demands: a reliable, individualized capital sentencing determination.

2. Mr. Hitchcock alleged that he was sentenced to death under a statute which permitted racial discrimination to play a significant role. In support thereof he tendered statistical studies which revealed a large race-based disparity in the imposition of the death sentence in Florida: while 43.3% of all homicides involved black victims, only 10.9% of all the death sentences imposed were for black-victim homicides. The studies eliminated as well "the most common nondiscriminatory reasons" for this racial disparity, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981), by showing, through multiple regression analysis, that common nonracial factors could not account for it. Even outside the context of capital sentencing, these allegations established a prima facie case, whose only mission is to "permit [a rational] trier of fact to infer the fact at issue," id. at 254 n.7, not to establish that fact by a preponderance of the evidence. But

<sup>&</sup>lt;sup>3</sup> "The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery. . . . [T]he defendant killed Cynthia Ann Driggers for one purpose only, to avoid being arrested after commission of the involuntary sexual battery. . . . The murder was especially heinous, wicked, or cruel." R 196-197.

<sup>&</sup>lt;sup>4</sup> "At the time of the murder, defendant was 20 years of age. [This] [c]ircumstance . . . is applicable." R 197.

within the context of capital sentencing, where "there is a unique opportunity for racial prejudice to operate but remain undetected," *Turner* v. *Murray*, \_\_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 1683, 1687 (1986), and where "[t]he risk of racial prejudice infecting [the sentencing decision] is especially serious," *id.* at 1688, these allegations manifestly established a prima facie case. On these allegations, in a state whose history of racial discrimination is well-documented and extreme, the Constitution required evidentiary consideration.

#### ARGUMENT

I

FLORIDA'S PRE-LOCKETT CAPITAL SENTENCING
STATUTE OPERATED IN VIOLATION OF THE EIGHTH
AND FOURTEENTH AMENDMENTS BY ENFORCING THE
"MANDATORY LIMITATION" THAT ONLY THOSE
MITIGATING CIRCUMSTANCES "ENUMERATED" IN THE
NARROW STATUTORY "LIST" COULD BE CONSIDERED

Mr. Hitchcock was sentenced to death under a rule of law that this Court has condemned as violating the most basic constitutional principle of capital sentencing. Presented squarely for the first time, is the issue of the actual operation of Florida's statute prior to 1978 to limit the consideration of mitigating factors to the statutory list. Though in *Proffitt* v. *Florida*, 428 U.S. 242 (1976), the Court reviewed the facial constitutionality of Florida's capital sentencing statute, the actual operation of that statute was not examined. *Id.* at 254 n.11.<sup>5</sup> In this case, the statute operated in precisely the same manner as the Ohio statute subsequently struck down in *Lockett* v. *Ohio*, 438 U.S. 586 (1978).

# A. Introduction: The Lockett Mandate Of Individualized Capital Sentencing

Since Lockett, it has become plain that the most fundamental Eighth Amendment requirement applicable to capital sentencing is that the process for selecting those who will die must provide for reliable individualization. Lockett invalidated a statute that restricted the independent consideration of mitigating factors to a narrow statutory list, because the failure to weigh all relevant individuating circumstances concerning the defendant and his crime created the constitutionally "unacceptable" "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. at 605 (plurality opinion), and the Court has consistently demanded adherence to the Lockett principles.

Therefore, today "[t]here is no disputing," Skipper, 106 S.Ct. at 1670, the force of the constitutional mandate. "What is important at the selection stage is an individualized determination on the basis of the character of the individual offender and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983).

# B. Florida's Response To Furman: Limiting Mitigation By Statute

The constitutional necessity of individualized sentencing in capital cases was not, however, always so clear. The nine separate opinions in *Furman* v. *Georgia*, 408 U.S. 238 (1972), "[p]redictably . . . engendered confusion as to what was required in order to impose the death penalty in accord with

Florida statute with regard to mitigating factors. In Darden v. Wainwright, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 S.Ct. 2464 (1986) the Court rejected a claim of ineffective assistance of counsel for failure to present certain mitigating evidence. 106 S.Ct. at 2475. As an alternative, Darden had "claim[ed] that his trial counsel interpreted [the] statutory list of mitigating factors, as an exclusive list." Id. The Court "express[ed] no view about the reasonableness of that interpretation of Florida law, because in this case, the trial court specifically informed" counsel that he could "go into any other factors" Id.

<sup>&</sup>lt;sup>6</sup> All references to the *Lockett* decision herein will be to the prevailing, plurality opinion unless otherwise stated.

<sup>&</sup>lt;sup>7</sup> The Court has also found constitutional error where a statute was applied so as to preclude the independent consideration of mitigating evidence, Eddings v. Oklahoma, 455 U.S. 104 (1982); where state evidentiary rules excluded such evidence, Green v. Georgia, 442 U.S. 95 (1979); and where the proffered evidence was rejected as irrelevant, Skipper v. South Carolina, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 S.Ct. 1669 (1986). See generally Enmund v. Florida, 458 U.S. 782, 827-28 (1982) (O'Connor, J., dissenting) (summarizing the Court's decisions concerning the mandate of individualized capital sentencing).

the Eighth Amendment." Lockett, 438 U.S. at 599.8 States responded differently, those that chose "guided discretion" statutes were "[c]onfronted with what reasonably appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after Furman," Lockett, 438 U.S. at 599 n.7, and as a consequence some included provisions to limit the mitigating factors that could be considered. See, e.g., Lockett id.; State v. Richmond, 144 Ariz. 186, 560 P.2d 41, 50 (1976), cert. denied, 433 U.S. 915 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 889, cert. denied, 434 U.S. 878 (1977); People v. District Court, 586 P.2d 31, 33 (Colo. 1978). 10

#### 1. The 1972 Florida Statute

Florida was among those states that followed the "reasonable" view that Furman required restriction of mitigating factors. Prior to Furman, in March, 1972, the Florida Legislature had enacted a new capital sentencing statute which provided a bifurcated trial and "contained lists of aggravating and mitigating circumstances, but only as guidelines for matters to be

considered during the sentencing proceeding." <sup>11</sup> Furman supervened and this statute was never used. In the months after Furman, a mandatory sentencing scheme was seriously considered, <sup>12</sup> but after intense debate over the meaning of Furman, the Florida Legislature chose the Governor's proposal, consisting of a modified version of the Model Penal Code. <sup>13</sup> The statute that emerged restricted discretion by

<sup>12</sup>This proposal was vigorously advocated by the Attorney General. See Ehrhardt, et. al, at 3 & n.7; Ehrhardt & Levinson, at 12 n.28.

<sup>13</sup>A detailed contemporaneous analysis of the legislative history concerning the passage of Florida's capital sentencing statute is preserved in Ehrhardt & Levinson, supra. An overview of that history demonstrates that the statute that emerged restricted consideration of mitigating factors exclusively to the statutory list. The Governor's proposal with minor changes was the one that finally passed. Of relevance here, that proposal restricted aggravating and mitigating factors strictly to those listed in the statute. The Governor's panel of legal advisors had opined that: "In order to stand any chance of satisfying constitutional requirements, statutory [aggravating and mitigating guidelines must evidently be made obligatory rather than merely advisory, otherwise the sentence can still be imposed in a completely capricious and arbitrary manner." Ehrhardt, et al., at 5. In the "whirl-wind four day special session" of the Florida Legislature, Ehrhardt & Levinson, at 21, three proposals were acted upon. A House committee passed a mandatory capital sentencing bill, id. at 13-14. The Governor's proposal, restricting aggravating and mitigating factors to the statutory list and also providing for a three-judge sentencing panel rather than a jury, was offered and approved (unanimously) as an amendment to the House bill. Id. at 14 & n.48. The Florida Senate passed a similar bill, except that it did not limit aggravating and mitigating circumstances to the statutory list, and it also provided that the jury was to be involved in sentencing. Id. at 14-15. At the conference committee on the evening of the last day of the Special Session, a compromise was reached. The limitation on aggravating and mitigating factors was retained from the House bill, and the provisions for the jury from the Senate bill was included (though only in an advisory role). Id. at 15. Accordingly, "[t]he final statute . . . adopted the limitations [on aggravating and mitigating factors of the Governor's bill." Id. at 15 n.56. Another analysis of the Florida legislative history, likewise, finds that "the bill that was enacted as the 1972 death penalty statute incorporated the House's original intention to restrict mitigating circumstances to the factors enumerated in the statutory list." Hertz & Weisberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 Calif. L. Rev. 317, 358 n. 199 (1981).

<sup>&</sup>lt;sup>8</sup> Florida fared no better than other observers in interpreting Furman. See Donaldson v. Sack, 265 So.2d 499, 506 (Fla. 1972) (Roberts, C.J., concurring) ("I have carefully read and considered the nine separate opinions [in Furman] and am not yet certain what rule of law, if any, was announced that has the support of the majority of the Court"). The legal advisors to the Florida Governor's committee studying capital punishment expressed similar views. Ehrhardt, Hubbart, Levinson, Smiley, & Wills, The Future of Capital Punishment in Florida: Analysis and Recommendations, 64 J. Crim. L. & Criminology 2, 3 (1973) (hereinafter cited as "Ehrhardt, et. al").

<sup>&</sup>lt;sup>9</sup> See generally Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1699-1712 (1974).

which could be considered in mitigation was that several of the statutes stricken along with Furman had contained provisions for and lists of mitigating factors, but these "lists" were open-ended and nonexclusive. See, e.g., Delgado v. Connecticut, 408 U.S. 940 (1972). From these decisions commentators concluded that while there must be narrow categories of aggravating and mitigating circumstances, they must be exclusive so as to meet the requirements of Furman. See Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1698-99 (1974); Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U.L. Rev. 108, 132-33 (1974); Note, Florida Death Penalty: A Lack of Discretion?, 28 U. Miami L. Rev. 723, 724 & n.12 (1974).

<sup>11</sup>Ehrhardt & Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. Crim. L. & Criminology 10 (1973) (hereinafter cited as Ehrhardt & Levinson). Florida's history therefore strikingly parallels that of Ohio. Both legislatures were in a similar posture at the time Furman was announced; both, as will be shown infra, reacted to Furman by making the lists of aggravating and mitigating circumstances exclusive. Ohio's history is reviewed in Lockett, 438 U.S. at 599 n.7.

listing certain exclusive aggravating and mitigating factors. The statute's plain terms mandated that the jury and judge determine first whether "sufficient aggravating circumstances exist as enumerated in subsection[(5)]" and whether "sufficient mitigating circumstances exist as enumerated in subsection[(6)]"; then, "[b]ased on these considerations, whether the defendant should be sentenced to life or death." §§ 921.141 (2) and (3), Fla. Stat. (1973) (emphasis supplied). In listing the aggravating and mitigating factors that could be considered. the Legislature said that both were "limited to" those listed in the statute. Through an undetected transcription error in the hurried special session, the words "limited to" were inadvertently dropped from the separate subsection listing mitigating factors. See Hertz & Weisberg, at 358 n. 199. Nevertheless, the statute's embodiment of the "reasonable" view that Furman required mitigation to be limited was clear, for in actually determining the sentence the jury and judge were explicitly restricted to consideration of the factors "as enumerated" in the statute. "Thus the enumerated circumstances are intended to be the exhaustive list of sentencing considerations."14

### 2. Implementation Of The Statute By The Florida Court

The statute was first construed in the seminal case of State v. Dixon, 283 So.2d 1 (Fla. 1973), which emphasized that its

primary mechanism for satisfying Furman was the itemization of specific aggravating and mitigating circumstances so as to restrain sentencing discretion. The opinion referred frequently and invariably to "the" mitigating circumstances citing the statutorily enumerated factors. For example, the court spoke of "the mitigating circumstances provided in Fla. Stat. 921.141(7), F.S.A." in describing how the sentence was to be decided. 283 So.2d at 9. The dissent likewise specifically noted the limitation on consideration of mitigating circumstances to those contained in the statute. Id. at 17 (Ervin, J., dissenting). 15 Dixon's understanding of the exclusive nature of the statutory mitigating circumstances continued to be reflected in the court's opinions. 16

The Florida court's next express pronouncement on the subject came in 1976. A few days after *Proffitt* it squarely faced the question whether the statute permitted consideration of evidence of nonstatutory mitigating factors and said with uncommon clarity that the statute strictly barred such consideration. *Cooper v. State*, 336 So.2d 1133 (Fla. 1976), *cert. denied*, 431 U.S. 925 (1977). In *Cooper* the Florida court affirmed the

<sup>14</sup> Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U.L. Rev. 108, 139 (1974). The transcription error resulting in the lack of parallel language in the lists of aggravating and mitigating factors was thus apparently unnoticed or at least not seen as having any significance by the commentators at the time. It is not mentioned in the Ehrhardt & Levinson treatise contemporaneously analyzing the new statute. Instead they emphasized that the "final statute . . . adopted the limitations of the Governor's bill," id. at 15 n.54, and contrasted the March, 1972 law that used a list of mitigating circumstances "only as guidelines" with the "new law" where "statutory lists of aggravating and mitigating circumstances are intended to narrow the scope of discretion in making the life-or-death decision." Id. at 17 (footnote omitted). See also Note. Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1704 (1974) (describing Florida's statute as one which "control[s] the sentencer's discretion by delimiting the mitigating factors which it may consider," (emphasis supplied)); Vance, The Death Penalty After Furman, 48 Notre Dame Law. 850, 860 (1973) ("The Florida statute sets up exacting guidelines where the death penalty is applicable-including statutory mitigating and aggravating factors").

<sup>15</sup> See also Alford v. State, 307 So.2d 433, 444 (Fla. 1975) ("the most important safeguard provided by Fla. Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." (emphasis supplied)). This restriction to a statutory list of mitigating factors was also seen from State v. Dixon, supra, by commentators. Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U.L. Rev. 108, 129 (1974); Note, Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv. L. Rev. 1690, 1698, 1706 (1974); Comment, Resurrection of the Death Penalty: The Validity of Arizona's Response to Furman v. Georgia, 1974 Ariz. St. L.J. 257, 280-81, 293-94.

nitigating factors "must be determinative of the sentence imposed"); Slater v. State, 316 So.2d 539, 540 (Fla. 1975) (quoting trial court order that the judge "considered the itemized points for consideration in aggravation and in mitigation set forth in [statute]"); Songer v. State, 322 So.2d 481, 484 (Fla. 1975) (reviewing the death sentence by "relating the statutorily enumerated mitigating circumstances to the instant case" (footnote citing statute omitted)); Henry v. State, 328 So.2d 430, 431 (Fla. 1976) (quoting trial court order that the judge "considered the itemized points for consideration in aggravation and in mitigation set forth in [statute]"); Miller v. State, 332 So.2d 65, 66 (Fla. 1976) (same).

exclusion of mitigating evidence (stable employment record) because: "the Legislature chose to list the mitigating circumstances which it judged to be reliable . . . and we are not free to expand that list." Id. at 1139. It stressed the clarity of the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute's list, emphasizing that these were "words of mandatory limitation." Id. at 1139 n.7. It explained, consistent with the legislature's "reasonable" view, that such a result was required by Furman: "This [holding] may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty." Id. (emphasis in original). 17 Accordingly, "[t]he sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have (sic) no place in that proceeding." Id. at 1139 (emphasis supplied).

Thereafter, the Florida Supreme Court's opinions continued to reflect this "narrowly harsh" "mandatory limitation" confining consideration of mitigating factors to the statutory "list." It was not until after *Lockett* that another view was recognized.

### 3. The Florida Supreme Court Deals With Lockett

Lockett posed an obvious problem for the Florida Supreme Court. However, instead of admitting that its previous "mandatory limitation" on mitigating circumstances conflicted with Lockett and resolving that conflict, 19 the court simply denied that there had ever been such a limitation in the statute or in its holdings. Songer v. State, 365 So.2d 696 (Fla. 1978). Said Songer: "Obviously, our construction of Section 921.141 (6) has been that all relevant circumstances may be considered in mitigation." Id. at 700. Both the holding of Cooper affirming the preclusion of nonstatutory mitigating character evidence. and its rationale that the nonexpandable "list" of mitigating factors was a "mandatory limitation" required by Furman was said to be "not apropos to the problems addressed in Lockett." Id. Cooper was said to have been concerned only with whether the mitigating evidence was "probative," not with whether the evidence fell outside the statutory list of mitigating factors. Id. 20 With Cooper thus shunted aside, the court cited to six of its prior pre-Lockett decisions which, "among others," it said "obviously" showed that the statute was nonlimiting. Those cases were said to have approved trial courts' consideration of nonstatutory mitigating factors. In fact, as it has been accurately observed, the cited opinions "do not 'obviously' state" that proposition and in fact "suggest[] a contrary conclusion." Songer v. Wainwright, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 817, 821 n.9 (1985) (Opinion of Marshall, J., dissenting from denial of cer-

<sup>&</sup>lt;sup>17</sup> It is relevant to note again that the legal advisory committee to the Florida Governor, whose bill eventually prevailed, had opined that "[i]n order to stand any chance of satisfying constitutional requirements, statutory [aggravating and mitigating] guidelines must be made obligatory rather than merely advisory." Ehrhardt, et al., at 5 (emphasis supplied).

<sup>18</sup> See, e.g., Adams v. State, 341 So.2d 765, 769 (Fla. 1977) ("none of the statutory mitigating circumstances were shown to exist" (emphasis supplied)); Knight v. State, 338 So.2d 201, 205 (Fla. 1976) ("consideration of the enumerated aggravating and mitigating circumstances support...death" (emphasis supplied)); Funchess v. State, 341 So.2d 762, 763 (Fla. 1977) ("trial judge carefully evaluated in detail each of the mitigating and each of the aggravating circumstances set out in section 921.141" (emphasis supplied)); Barclay v. State, 343 So.2d 1266, 1270 (Fla. 1977) ("the judge...meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute" (emphasis supplied)); Harvard v. State, 375 So.2d 833, 835 (Fla. 1978) ("The record discloses no mitigating factors recognized by the statute" (emphasis supplied)).

v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978) (finding a portion of the Arizona capital statute unconstitutional insofar as it restricted mitigation and ordering resentencing, People v. District Court, 586 P.2d 31 (Colo. 1978) (declaring statute unconstitutional under Lockett). It is pertinent to note that in each of these states the statutes had been seen as substantially the same as Florida's statute.

<sup>&</sup>lt;sup>20</sup> In a later post-conviction decision in Cooper's case the court went further to explain that in its original *Cooper* decision, it had not even addressed the question of whether the mitigating character evidence fell outside the statutory list, because that issue, it said, had not been presented by Cooper. *Cooper v. State*, 437 So.2d 1070, 1071 (Fla. 1983) (*Cooper II*) ("In his initial appeal... Cooper raised the question of whether certain evidence he had proffered was probative and relevant to the *statutory* mitigating factors, and we answered the question in the negative" (original emphasis)). It then went on to say that the issue was defaulted for post-conviction and could not be excused by a change in law because "*Lockett* did not change the law of Florida." *Id.* at 1072.

tiorari).  $^{21}$  See also Hertz & Weisberg, at 357 & nn. 194, 195 (analyzing the cited opinions).

#### 4. The Pre-Lockett Florida Statute Was Unconstitutional

A state court is, of course, free to interpret state statutes as it pleases. Its interpretation, once rendered, is binding upon the federal courts. E.g., Wainwright v. Stone, 414 U.S. 21 (1973). A state court may change its interpretation of statutes to meet constitutional demands, id., and by such reconstruction save the facial constitutionality of an otherwise unconstitutional statute. Id.; Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). But all of this speaks to the future. A state court cannot unmake history by rewriting it. Thus, the "remarkable job of plastic surgery" that the Songer court performed on the statute and on its own prior construction of the statute does not "serve[] to restore constitutional validity" to sentences imposed under the earlier, unconstitutional procedure. 22 Shuttlesworth v. Birmingham, 394 U.S. 147, 153, 155 (1969).

Commentators have noted that the *Songer* decision represents an attempt to do just this: to evade the mandate of *Lockett* and save the constitutionality of prior Florida death sentences by a shift having no "fair and substantial support" in state law.<sup>23</sup> Their view is confirmed, implicitly but consistently, by judicial decisions which leave no legitimate doubt that the pre-*Songer* statute was applied restrictively to preclude consideration of any mitigating circumstances not expressly enumerated in it. The Eleventh Circuit has recognized the exclusion of nonstatutory mitigating circumstances decreed by *Cooper*.<sup>24</sup> This Court has noted the change in Florida law that removed restrictions on consideration of mitigating factors in

<sup>&</sup>lt;sup>21</sup> Only three of the decisions cited in Songer had been announced prior to Mr. Hitchcock's trial in January, 1977. None of those decisions said anything about the propriety (or authority) of considering nonenumerated mitigating factors. In Chambers v. State, 339 So. 2d 204 (Fla. 1976), the court found error in the imposition of the death sentence where the jury had recommended a life sentence. The court did not anywhere in the opinion discuss mitigation, except to quote the trial court's findings with regard to the "aggravating and mitigating circumstances contained in Chapter 921, Florida Statutes." Id. at 205 (emphasis supplied). Likewise, Meeks v. State, 336 So. 2d 1142 (Fla. 1976), contains no discussion of mitigating factors except the quotation of the trial court order referring, by section numbers, only to the statutory mitigating factors. The death sentence in Messer v. State, 330 So. 2d 137 (Fla. 1976), was reversed because the judge had denied Messer the opportunity to obtain psychiatric evidence to present to the jury pertinent to the statutory mitigating factor in § 921.141 (6)(b) (extreme mental or emotional disturbance), 330 So. 2d at 142. Error was also found in the trial court's failure to apply the equal protection principle established in Slater v. State, 316 So.2d 539 (Fla. 1975), and to allow the jury to be informed of the codefendant's sentence so as to implement this equal-application principle. Thus, contrary to Songer's characterization of these decisions, nothing in the opinions foretells anything but the exclusivity of the statutory mitigating factors.

<sup>&</sup>lt;sup>22</sup> It is self-evident that the Florida statute as interpreted in Cooper, with its "narrowly harsh" "mandatory limitation" to an unexpandable statutory "list" of mitigating factors is indistinguishable from the Ohio statute struck down in Lockett.

<sup>&</sup>lt;sup>23</sup> See Hertz & Weisberg, at 351 (Florida construed its statute "in such a way as to evade the effect of Lockett. . . [and] ignored statutory language and earlier case law to construe apparently exclusive statutory rosters as nonexclusive and [has] applied the new construction[] retroactively to validate sentences imposed under the previous, unconstitutional constructions"); id. at 356 (The Songer case is "so lacking in 'fair or substantial support' in state law as to be [a] subterfuge[] or pretext[] for evading a federal claim"); id. at 358 (same); Dix, Appellate Review of the Decision to Impose Death, 68 Geo. L.J. 97, 138 (1979) (criticizing the Florida Supreme Court for its "unwillingness in Songer to acknowledge that Cooper was wrongly decided and to rectify that error").

<sup>&</sup>lt;sup>24</sup> See, e.g., Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc) (state trial judge had interpreted the Florida statute as limiting the consideration of mitigating factors to the statutory circumstances); id. at 1495 (Clark, J., concurring and dissenting) ("Florida law, as reasonably and logically construed by both [counsel and the trial court], operated to preclude non-statutory mitigating evidence"); Proffitt v. Wainwright, 685 F.2d 1227, 1238 n.19 (11th Cir. 1982) (finding that Cooper held that mitigating factors were limited exclusively to the statute); Ford v. Strickland, 696 F.2d 804, 812 (11th Cir. 1983) (en banc) (Lockett was a "direct reversal" of the Cooper holding that mitigating factors were limited to the statute); Foster v. Strickland, 707 F.2d 1339, 1346 (11th Cir. 1983) (in Cooper "the Florida Supreme Court ruled explicitly that the jury could consider only statutory mitigating circumstances").

The treatment of pre-Songer Florida law by the court of appeals below in the present case was more guarded. The en banc majority acknowledged that "there was some ambiguity [in the Florida capital statute] as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors enumerated by the Statute." 770 F.2d at 1516; JA 122. The "confusion in Florida law surrounding nonstatutory mitigating evidence" was "finally alleviated" after Lockett. Id.

1978 after *Lockett*. <sup>25</sup> And courts in other states that had viewed their statutes as identical to Florida's before *Lockett* had also read those statutes as limiting mitigation consistently with *Cooper*. <sup>26</sup>

Since Songer, the Florida Supreme Court itself recognized on direct appeals in two cases that the trial judges had "misinterpreted" Cooper as precluding the consideration of non-statutory mitigating factors. <sup>27</sup> In its own review of sentencing determinations, the court has sometimes persisted in referring to the mitigating circumstances "as set forth" in the statute. <sup>28</sup> For a time, its decisions in post-conviction cases raising Lockett claims were consistent only in denying relief under all circumstances: they held on a case-by-case basis that Lockett either

had or had not changed Florida law depending upon the results that would flow from these respective conclusions. <sup>29</sup> It is only this year, after the Eleventh Circuit's en banc decisions in the present case and Songer v. Wainwright, supra, that the Florida court has begun to face the problem directly.

In Harvard v. State, 486 So. 2d 537 (Fla. 1986), the trial judge (who also heard Harvard's post-conviction motion) "expressly found that 'reasonable lawvers and judges . . . could have mistakenly believed that nonstatutory mitigating circumstances could not be considered." and that "'ft he court certainly carried out its responsibility on the basis of that premise at time of Mr. Harvard's trial." Id. at 539. A divided Florida Supreme Court agreed and found Harvard's death sentence to have been "imposed in violation of Lockett." Id. 30 In Harvard. the Florida court further found "no factual dispute" concerning the allegation that Harvard's trial lawyer had also believed that Florida law precluded consideration of nonstatutory mitigating circumstances and so had failed to develop and present mitigating evidence at the sentencing hearing. It rejected a claim of ineffective assistance of counsel on these facts because, "given the state of the law at the time." counsel's conduct "reflects reasonable professional judgment." Id. at 540.31

<sup>&</sup>lt;sup>25</sup> See Spaziano v. Florida, 468 U.S. 447, 451 n.4 (1984) (recognizing the change in Florida law that occurred in 1978 from consideration of only "statutory mitigating circumstances" to "any mitigating circumstances"); Barclay v. Florida, 463 U.S. 939, 961 n.2 (1983) (same). See also Songer v. Wainwright, \_\_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 817 (1985) (order denying certiorari, Marshall, J., dissenting) (surveying the history of Florida law regarding the limitation on mitigating circumstances). As the Court noted; Florida amended its statute after Lockett to remove the "as enumerated" language from the subsections setting out the procedure to be followed by the jury and the judge for determining the appropriate sentence. See §§ 921.141(2), (3), Fla. Stat. (1979); App. 5a.

<sup>&</sup>lt;sup>26</sup> For example, the Arizona Supreme Court, finding the Florida statute to be "indistinguishable from Arizona's statute" held that "the trial judge is bound, as are we, to consider only those . . . mitigating factors listed in the statute" and thus approved the judge's refusal to consider a nonstatutory mitigating factor. State v. Bishop, 118 Ariz. 263, 576 P.2d 122, 128 (1978). See also State v. Simants, 197 Neb. 549, 250 N.W. 2d 881, 889 (1977) ("the Florida Statute is very similar to the Nebraska statute in that the sentencing authority is required to weigh statutory aggravating and mitigating circumstances").

<sup>&</sup>lt;sup>27</sup> Perry v. State, 395 So.2d 170, 174 (Fla. 1981); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981).

<sup>&</sup>lt;sup>28</sup> In Ford v. State, 374 So.2d 496 (Fla. 1979) the court described its review process concerning mitigating factors:

We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitigation. . . . Our duty under section 921.141, Florida Statutes (1975), as upheld by the United States Supreme Court . . . is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenty.

Id. at 503 (emphasis supplied).

<sup>&</sup>lt;sup>29</sup> Compare Muhammad v. State, 426 So.2d 533, 538 (Fla. 1983) (trial counsel could not be "expected to predict the decision in Lockett v. Ohio"); Jackson v. State, 438 So.2d 4, 6 (Fla. 1983) (counsel's belief that "he could not present evidence of nonstatutory mitigating circumstances . . . was entirely reasonable"), with, Cooper II, 437 So.2d at 1072 ("Lockett did not change the law of Florida").

<sup>&</sup>lt;sup>30</sup> The court said that it agreed with the similar result reached by the Court of Appeals for the Eleventh Circuit in Songer v. Wainwright, supra, but did not explain why it had declined to grant relief to Songer when he had presented his claim in Songer v. State, 463 So.2d 229 (Fla. 1985). Harvard, 486 So.2d at 538-39. In rejecting Songer's claim the court had relied upon its original Songer opinion which "held that neither the wording of section 921.141 nor our previous decisions precluded the introduction of non-statutory mitigating evidence." 463 So.2d at 231.

<sup>&</sup>lt;sup>31</sup> Still more recently in an appeal from a resentencing by a judge without a jury, the court remanded for resentencing with a jury because it appeared that at the defendant's original pre-Songer sentencing in 1977 the trial judge had interpreted the law as confining the jury to the statutory mitigating factors: "he instructed only on the statutory mitigating circumstances." Lucas v. State, 490 So.2d 943, 946 (Fla. 1986). The court's opinion recognizes that defense counsel also was apparently operating under the same restrictive belief. Id.

Thus, "[a]lthough the Florida statute approved in Proffitt [may not have] . . . clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor," Lockett, 438 U.S. at 506-607 (emphasis supplied), it is no longer disputable that the tatute did operate in precisely that manner, at least between the dates of Cooper and Songer. This Court's "assum[ption] . . . [in Proffitt | that the range of mitigating factors listed in the statute was not exclusive," id. at 606, was undercut only a few days later by the unmistakable holding in Cooper. And Cooper's authoritative construction of the statute—which, of course, "fixes the meaning of the statute" for federal constitutional purposes "as definitely as if it had been so amended by the legislature," Winters v. New York, 333 U.S. 507, 514 (1919); see, e.g., Wainwright v. Stone, supra-rendered the stat ite unconstitutional under Lockett at the time that Mr. Hitche ek was tried and condemned to die under it, in February of 19 7.

That, without more, should suffice to invalidate his dea h sentence. The execution of a death sentence imposed pursuant to a federally unconstitutional statute would be inconceivable. This is why, having invalidated the Ohio death-penalty statute in *Lockett*, the Court vacated all death sentences imposed under it in cases pending here, *Roberts* v. *Ohio*, 438 U.S. 910 (1978), and companion cases, *id.* at 910-11; *Adams* v. *Ohio*, 439 U.S. 811 (1978), and the Ohio Supreme Court subsequently ordered them all to be set aside, and the condemned inmates resentenced to imprisonment.

This makes sound practical sense. Picking and choosing among inmates sentenced to die under the same unconstitutional statutory regime—upsetting the death sentences of some but not of others, as the Florida Supreme Court is now

doing—makes no sense at all. As one Justice of the Florida court has pointed out:

[I]t seems fundamentally unfair to me for one person to go to the gallows when nonstatutory mitigating circumstances were not considered, while others may not be going because those circumstances were considered.

Jackson v. Stute, 438 So.2d at 7 (McDonald, J., dissenting).

The uncorrected application of the pre-Songer Florida statute is indeed "fundamentally unfair," for it calls into question the accuracy of sentencing decisions made during its tenure. In many cases its effect may have been subtle or invisible on the face of the record, though it operated powerfully at many levels, constraining the lawyers, the jury, the judge, and even review by the Florida Supreme Court. Given the radical inconsis ency of the then-prevailing Florida law, with the basic mandate of the Eighth Amendment as construed in Lockett, it is impossible to deny that "the risk that the death penalty will be [inflicted upon James Hitchcock and others similarly situated 151 . . . in spite of factors which may call for a less severe penalty" is very higt.. Lockett v. Ohio, 438 U.S. at 605. The Court has emphasized that such a risk "is unacceptable and incompatible with the . . . Eighth . . . Amendment[]." Id.34 Considering the consequences of erroneous decisions on a matter so grave as the imposition of society's ultimate punishment. the price of rectifying the risk of error by vacating Mr. Hitchcock's death sentence and others of like vintage "would surely

<sup>&</sup>lt;sup>32</sup> In Gilmore v. Utah, 429 U.S. 1012, 1017-18 (1976), Justice White expressed the view that no person can properly be put to death under an unconstitutional statute, even with his consent. Although a majority of the Court disagreed, it did so only because "Gilmore made a knowing and intelligent waiver of any and all federal rights he might have asserted after the [death] . . . sentence was imposed." Id. at 1013.

<sup>33</sup> In its next session after Lockett and Songer the Florida Legislature amended the capital sentencing statute to remove the "as enumerated" language that had been relied upon by the Cooper court as "words of mandatory limitation." 1979 Laws of Fla., Ch. 79-353. Thus, of the 230 inmates presently on Florida's death row, 26 or fewer who were sentenced before Lockett remain pending in post-conviction proceedings, and but 12 of these were sentenced after the Lockett decision was announced. See Appendix B reviewing the present status of persons sentenced prior to Lockett. App. 6a-17a.

<sup>&</sup>lt;sup>34</sup> See e.g., Eddings v. Oklahoma, 455 U.S. at 119 (O'Connor, J., concurring) ("we may not speculate as to whether the [state courts] actually considered all of the mitigating factors. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court").

be well spent." Gardner v. Florida, 430 U.S. 349, 360 (1977) (plurality opinion).  $^{35}$ 

#### C. The Statute's Effect On Mr. Hitchcock's Sentencing

Even were it not so clear that Florida law in February, 1977 restricted the consideration of individuating evidence in mitigation to an extent forbidden by Lockett, Mr. Hitchcock himself would be entitled to relief under Lockett, for two reasons. First, it appears on the face of the record that all of the parties at Mr. Hitchcock's trial—the lawyers, the jury through counsels' arguments and the court's instructions, and the judge—adhered to this restrictive view of the statute. Second, in the present federal habeas proceedings, Mr. Hitchcock pleaded specifically, and made a sufficient showing to entitle him to prove that his defense attorney reasonably believed the statute restricted mitigation to enumerated factors, and consequently counsel forewent investigation, presentation and argument of substantial nonstatutory mitigating evidence.

# 1. The Record On Its Face Shows The Limitation On Mitigation

Mr. Hitchcock's trial occurred after Cooper but before Lockett, during the period when the Florida statute stood authoritatively construed "harsh[ly]" enforcing a "mandatory limitation" upon the consideration of mitigating factors. Viewing the record of Mr. Hitchcock's trial and sentencing solely on its face, the pervasive effect of the statutory limitation plainly emerges. Everyone in the proceeding manifestly operated on the premise that consideration of mitigation was strictly limited by and to the statute.

In describing for the jury the weighing process central to the Florida capital sentencing scheme, defense counsel referred only to the "several different aggravating circumstances and several different mitigating circumstances that the judge is going to tell you that you are to consider in rendering an

advisory verdict." TAS 17 (emphasis supplied). As predicted, the judge instructed only on the statutory mitigating factors: "The mitigating circumstances which you may consider shall be the following: [reciting the statutory list]." TAS 56.<sup>36</sup>

The prosecutor's argument likewise conveyed the limitation. He told the jury that the judge would instruct it on the "seven mitigating circumstances" and that "after you have considered all the aggravating circumstances, then you are to consider the mitigating circumstances and consider them by number." TAS 27-28 (emphasis supplied). See also TAS 43-44 (prosecutor tells the jury to use "mathematics" to sum up the statutory aggravating and mitigating factors to determine the appropriate sentence).

Further, the judge's sentencing order clearly reveals his belief that he could consider only statutory mitigating factors in determing the appropriate sentence: "this Court finds that sufficient aggravating circumstances exist as enumerated in Fla. Stat. 921.141(5) to require imposition of the death penalty, and there are insufficient mitigating circumstances, as enumerated in Fla. Stat. 921.141(6), to outweigh the aggravating circumstances." TR 192 (emphasis supplied). The judge's findings of fact in support of the sentence describe the process he undertook in determining it and plainly disclose his application of the statutory limitation:

In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to certain enumerated "aggravating" and "mitigating" circumstances.

TR 195 (emphasis supplied).37

<sup>&</sup>lt;sup>35</sup> Cf. Turner v. Murray, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 1683, 1688 (1986) (comparing the risk of an unconstitutional sentencing with "the ease with which that risk could have been minimized").

<sup>&</sup>lt;sup>36</sup> Also, the judge had previously told the jury that he would "instruct you on the factors in aggravation and mitigation that you may consider under our law." TAS 5.

<sup>37</sup> Unlike the situation in Songer v. Wainwright, supra, and Harvard v. State, supra, where the original sentencing judges heard the state post-conviction motions and during those proceedings stated that they had earlier believed the statute limited consideration of mitigating factors, the original sentencing judge in Mr. Hitchcock's case did not hear his post-conviction motion. Thus, unlike in those cases, the record here does not contain an

It is therefore unequivocal upon the record that all parties viewed the statute as confining mitigation strictly to its four corners—a view consistent with the prevailing perception of Furman's requirements and with the "mandatory limitation" announced by the State's highest court in Cooper. And not only does the record on its face show the belief of all parties it also shows the effect of that belief on the proceedings.

Although defense counsel had been able to present some brief character evidence in the guilt/innocence phase of the trial to show that James Hitchcock's brother, Richard, was more likely to have committed the offense, and why James would have tried to cover up and accept the blame for Richard, 38 counsel's presentation in the penalty trial was limited to an attempt to establish a statutory mitigating circumstance. Counsel presented another brother's testimony that their father died when James was young and that James had "sucked on gas" and passed out once when he was five or six years old after which his "mind wandered." By this evidence, counsel attempted to show a basis for the statutory mitigating circumstance relating to mental condition, § 921.141(6)(b), Fla. Stat. (1975). Counsel refrained from arguing to the jury, as independent mitigating reasons calling for a sentence less than death, even the barebones character evidence that had previously made it into the record. Rather, counsel simply alluded briefly to some of the evidence, offering it "for whatever purposes you [the jury] deem appropriate." TAS 14. After this brief, restrained and enigmatic comment, counsel stuck

strictly to the meager statutory mitigating factors in arguing against the imposition of death. TAS 21-25.39

So, the record on its face reveals that the narrowly restrictive application of the statute actually infected this particular capital sentencing trial, "creat[ing] the risk that the death penalty [was]... imposed in spite of factors which call for a less severe penalty." Lockett, 438 U.S. at 606. As a result, Mr. Hitchcock was sentenced with the same disregard for individuating circumstances as were Monty Lee Eddings, Sandra Lockett and Ronald Skipper. He should not be denied the same constitutional relief.

#### 2. The Facts Beyond The Record

Though the disregard of individualization was shown by the trial record itself, Mr. Hitchcock proffered a further showing in his state and federal post-conviction proceedings. He alleged and offered to prove that counsel formulated a strategy of penalty defense under the well founded belief that the Florida statute precluded the presentation of nonstatutory mitigating factors. His allegations speak to four points:

*First*, he alleged that Florida law at the time of his trial restricted mitigation to the statutorily enumerated factors. As we have shown above, this is not subject to serious dispute.

Second, he alleged that his lawyer at that time reasonably believed that only statutory mitigating factors could be offered for consideration. This allegation was supported by an affidavit of trial counsel.<sup>40</sup>

express finding by the original judge that he subjectively limited his consideration to the statutory mitigating factors. Nowhere on the objective record, however, does it appear that the judge applied anything but the "manuatory limitation" set down by Cooper. And as in Lucas v. State, supra, the fact that the judge instructed only upon the statutory mitigating factors is strongly indicative of the judge's belief that the statute limited the consideration of mitigation to the statutory roster.

 $<sup>^{38}</sup>$  Most of this evidence had been excluded, however, on relevancy grounds. See p. 3 & n. 2, supra .

<sup>&</sup>lt;sup>39</sup> In fact, on direct appeal in this case, the Florida Supreme Court noticed from the record the limitation by counsel. Presented with a facial challenge to the statute under *Lockett*, the Florida Supreme Court resolved it by saying that "it appears that the defense itself chose to limit that presentation [of mitigating factors]." 413 So.2d at 748. When, however, in post-conviction proceedings where the reason for that self-limitation was shown, *see* discussion, *infra*, the court said that the "claim boils down to merely another *Lockett* challenge." 432 So.2d at 43 n.2.

<sup>&</sup>lt;sup>40</sup> This affidavit was appended to Mr. Hitchcock's motion for an evidentiary hearing. JA 38, 44. The court of appeals below faulted the affidavit for "not

Third, Mr. Hitchcock alleged that because of counsel's belief, counsel forewent pretrial investigation and preparation of evidence not falling with the statutory list of mitigating factors, for presentation in the penalty trial.

Fourth, he alleged and proffered significant evidence of nonstatutory mitigating factors that was available but, because of counsel's obedience to the statutory limitation, was not presented to or considered by the jury or judge in determining Mr. Hitchcock's sentence.<sup>41</sup>

indicat[ing] . . . that he [counsel] would have done anything differently at that time." JA 124. There are two problems with this criticism. First, it is a product off the misreading of Lockett discussed, infra. Second, it was procedurally improper and unfair. It ignored the allegations in the habeas petition itself concerning counsel's failure to investigate or present evidence of nonstatutory mitigating factors, JA 15-22, and instead focused upon the affidavit alone as determinative of Mr. Hitchcock's rights. It thus adjudicated Mr. Hitchcock's Lockett claim by applying procedural requirements first explicated in the en banc Hitchcock opinion to an affidavit made before these procedures were explicated, and before it was known that affidavits of trial counsel would be used as the basis for adjudicating such claims in the way that the Hitchcock en banc opinion used them. The failure to give Mr. Hitchcock an opportunity to meet these newly announced requirements was clear error. Cf. Smith v. Yeager, 393 U.S. 122 (1968); Blackledge v. Allison, 431 U.S. 63, 83 n.6 (1977). Had he been provided the opportunity to meet the new requirements, he could have done so. Affidavits appended as an exemplary proffer to his rehearing petition in the court of appeals showed that because the requirement was not known, prior to the announcement of that court's opinion, Mr. Hitchcock's trial counsel had not been asked to say in his affidavit what he would have done differently. If asked, counsel would have said that he "would have argued to the jury that Mr. Hitchcock's family history and childhood background were independent mitigating factors." Moreover, with regard to the nonstatutory mitigating evidence proffered in these habeas proceedings, he "would have presented such evidence, had that evidence been available to me and had I known I had the legal right to do so." Affidavit of Charles Tabscott, Appendix to Petition for Rehearing, Eleventh Circuit Court of Appeals, filed September 16, 1985.

<sup>41</sup> The nonstatutory mitigating evidence proffered by Mr. Hitchcock included testimony from family, friends and others who have known Mr. Hitchcock throughout his life. Such evidence not only provides the basis for understanding Mr. Hitchcock as an individual but also demonstrates specific character traits relevant to his capacity for rehabilitation, and particularly his ability to adjust to and live peaceably in prison. This evidence is detailed in his habeas corpus allegations, JA 18-22, his motion for evidentiary hearing, JA 39-42, and the report of Dr. Elizabeth McMahon, JA 46-53, and will not be repeated here. The expert testimony of Dr. McMahon, in addition to con-

Thus, Mr. Hitchcock has demonstrated by "specific factual allegations," Blackledge v. Allison, 431 U.S. at 76, a denial of an individualized sentencing determination every bit as damaging as the denials in Lockett and Eddings. As shown by the trial record on its face, and as elaborated in the allegations and in counsel's affidavit, defense counsel was obligated to make potentially mitigating arguments obliquely, through strained and inadequate efforts to shoehorn them into ill-fitting statutory categories, even where they were supported by the scant evidence that had gotten into the record for other purposes. More important, he forewent development of available, compelling mitigating evidence in unquestionably reasonable obedience to the limitations imposed by state law.

Since Mr. Hitchcock was denied a hearing on these allegations in both state and federal court, review is governed by the Court's well-established standards for summary dismissals. Such dispositions are proper in only two situations: if, assuming the truth of the allegations, the petitioner as a matter of law is conclusively entitled to no relief;<sup>42</sup> or where the allegations

firming and placing in context Mr. Hitchcock's family and social history, would establish his capacity for self-improvement, and good prospects for living peaceably and being a positive influence in prison:

James does not, in many respects, fit the more typical picture of those who commit violent acts against other individuals. His family, although very poor, was not physically abusive and the emotional neglect he experienced was more a function of ignorance and the circumstances than a function of intent. He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression. . . .

If James' sentence were commuted and he were to be in "population," there is every reason to believe that not only would he function well but he would be a positive influence. He has the ability to act in the role of an arbitrator and could probably assist in defusing situations that arise between inmates and staff and/or among inmates. Also, he is bright and he has comprehended and retained considerable information from reading and from watching educational television. He would be able to handle any assignment such as the library, legal aide, etc. well. . . .

Again, he is bright, articulate, capable of insight—all the characteristics which make one a good candidate for traditional psychotherapy.

JA 52-53.

<sup>&</sup>lt;sup>42</sup> Blackledge v. Allison, 431 U.S. at 74 n.4 (1977); Townsend v. Sain, 372 U.S. 293, 307, 312 (1963); Machibroda v. United States, 368 U.S. 487, 495-96 (1962).

are "patently false or frivolous" or "wholly incredible." <sup>43</sup> When properly viewed in light of *Lockett*, Mr. Hitchcock's claim could not have been summarily dismissed under these standards.

The court of appeals' opinion affirming its summary dismissal reflects a fundamental misunderstanding of the rule of *Lockett*. In essence, the court held that a *Lockett* error could occur under the circumstances presented by Mr. Hitchcock only if counsel would have presented a *different kind* of evidence and argument had he not been constrained by the unconstitutionally exclusive death penalty statute.<sup>44</sup> However, the holding of *Lockett* was not nearly this narrow.

In Lockett the presentence report presented a number of nonstatutory mitigating factors to the sentencer. 438 U.S. at 594, 597. While all of these factors could be considered by the sentencer, id. at 607-608, they "would generally not be permitted, as such, to affect the sentencing decision," id. at 608 (emphasis supplied), unless they "shed[] some light on one of the three statutory mitigating factors." Id. It was this aspect of the Ohio statute—precluding the sentencer from considering the nonstatutory mitigating factors in Sandra Lockett's case as "independently mitigating factor[s]"—that violated the Eighth Amendment. Id. at 607.

A violation of Mr. Hitchcock's rights can therefore be made out in *either* of two ways. First, since the statute's constraint upon counsel prevented counsel entirely from presenting certain kinds of evidence because it bore solely upon nonstatutory mitigating factors, the Eighth Amendment was violated as it was in *Green v. Georgia*, supra, and Eddings v. Oklahoma, supra. Relevant evidence of these kinds was entirely excluded from the sentencer's consideration. Mr. Hitchcock's case is brought within this aspect of Lockett by the substantial non-statutory mitigating evidence proffered below, which could have been developed and presented, but for the statute's prohibition.

Alternatively, Mr. Hitchcock demonstrated that the statutory constraint upon counsel obliged him to potential mitigating points indirectly, by shoehorning truncated evidence of unauthorized mitigating factors into the mold of statutory categories instead of arguing that the nonstatutory mitigating factors independently called for a life sentence. This violation is indicated by the face of the trial record and elaborated by the allegations and affidavit below. Although, as the court of appeals noted, defense counsel's penalty argument "referred to much of the evidence not fitting squarely within the confines of the statutory mitigating circumstances including the difficult circumstances of petitioner's upbringing, the possibility of rehabilitation, and that petitioner turned himself in," 770 F.2d at 1518; JA 125, counsel did not argue that this evidence was sufficient, considered in its own right, to affect the sentencing decision. He rather argued that the jury should consider this evidence "for whatever purposes you deem appropriate," TAS 14, and then tried to argue that some of this evidence helped establish statutory mitigating factors. TAS 21-25. Just as in Lockett, the Florida death penalty statute prevented counsel from presenting the nonstatutory mitigating evidence "as an independently mitigating factor," 438 U.S. at 607.

It was alleged below, supported by detailed proffers, that the statute as then construed operated to restrict counsel's representation of Mr. Hitchcock by causing counsel to forego substantial preparation, investigation and argument of non-statutory mitigating circumstances. As a consequence, the sentencing jury and judge were unable to consider significant nonstatutory mitigating evidence and were directed by coun-

<sup>&</sup>lt;sup>43</sup> Blackledge v. Allison, 431 U.S. at 76, 78; Machibroda v. United States, 368 U.S. at 495-96.

<sup>44</sup> In denying relief on Mr. Hitchcock's Lockett claim, the court of appeals held that

the record belies the argument that at the time of the case, the presentation to the jury [by defense counsel] would have been appreciably different had it not been for the possible confusion of petitioner's attorney as to the law on mitigating circumstances.

<sup>770</sup> F.2d at 1517; JA 124. Discussing counsel's "presentation to the jury," the court of appeals compared the evidence actually presented with the evidence that could have been presented if counsel had not been constrained, and it concluded that the same sort of evidence which could have been presented "was developed . . . to some extent for the jury." 770 F.2d at 1517-18; JA 124-25.

sel's advocacy to consider only a narrow list of statutory mitigating circumstances as a basis for a sentence less than death. In short, counsel's obedience to the authoritative command of state law "impeded the sentencing jury's [and judge's] ability to carry out [their] task of considering all relevant facets of the character and record of the individual offender." *Skipper* v. *South Carolina*, 106 S.Ct. at 1673.

That the unconstitutional application of the statute was mediated through the obedience of counsel here does not distinguish Lockett. The constitutional right announced in Lockett is a right against the preclusion of consideration by the sentencer of evidence in mitigation of the penalty of death. Such preclusion violates the Eighth Amendment regardless of the mechanism that produces it. Eddings v. Oklahoma, 455 U.S. at 113-14. When defense counsel pretermits the preparation of nonstatutory mitigating evidence because a state statute declares the evidence inadmissible, its consideration by the sentencer is precluded. Effectuation of the defendant's Lockett right thus depends upon action which must be initiated by counsel; and if counsel forebears to take that action out of obedience to state law, the right has been defeated by state law operating through the agency of counsel. Counsel's inaction brings about the constitutional violation and cannot be used to condone it.

Under our adversary model of criminal procedure, defense counsel as well as the court determines the shape of the proceedings and the ultimate issues to be focused for decision. See Herring v. New York, 422 U.S. 853, 862-64 (1975). Counsel as well as the court may cause the proceedings to fall below constitutional standards for the trial of guilt or penalty. Strickland v. Washington, 466 U.S. 668, 686 (1984). Indeed, when the constitutional violation aphoristically described as "ineffective assistance of counsel" occurs, it is not simply that counsel has failed to do his duty, but that his failing "has so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. "[T]he right to effective assistance of counsel is recognized not only for its own sake, but because of the effect it has on the ability of the

accused to receive a fair trial." United States v. Cronic, 466 U.S. at 658.

If counsel's actions in limiting his presentation on behalf of Mr. Hitchcock had been unreasonable—not dictated by a professionally competent understanding of the governing law or by an informed tactic—they would have raised a Sixth Amendment issue to be determined under Sixth Amendment standards. Here, however, counsel's actions in obeying the statutory limitation were reasonable, because of the authoritative construction of the statute at that time, and because—as we shall further note below—there was no sound basis in federal constitutional law for challenging that construction. In this situation, the consequences of the statutory exclusion of non-enumerated mitigating factors from consideration in the capital sentencing process was the responsibility of the State, and violates the Eighth Amendment rule of Lockett.

This is not to say, obviously, that every instance in which a lawyer fails to present relevant mitigating evidence implicates the Eighth Amendment. It does not. What distinguishes the present case is the unique configuration of Florida law after Cooper and before Songer, which so clearly operated as a constraint upon counsel's performance. 46 Here it was the direct force of state law that precluded the marshalling of mitigating evidence for consideration by the sentencer, and thereby denied Mr. Hitchcock the "individualized decision [that] is essential in capital cases," Lockett, 438 U.S. at 605.

The situation is thus akin to cases in which defense counsel is restrained in his representation of one client by his representa-

<sup>&</sup>lt;sup>45</sup> Mr. Hitchcock alleged below, in the alternative, that if the courts deemed counsel's reliance upon the statutory limitation to be unreasonable, then he was denied the effective assistance of counsel under the standards set forth in *Strickland* v. *Washington*, 466 U.S. 668 (1984). This alternative claim has never been reached, since counsel's reasonableness was accepted below.

<sup>&</sup>lt;sup>46</sup> See State v. Evans, 120 Ariz. 158, 162, 584 P.2d 1149, 1153 (1978) (upon invalidation of the Arizona statute on Lockett grounds, defendant was remanded for resentencing even though he did not attempt to present any mitigating circumstances at his sentencing hearing, because a reviewing court must assume that "he was relying on the limitations on mitigating factors imposed by [the statute]").

tion of a codefendant with conflicting interests. E.g., Holloway v. Arkansas, 435 U.S. 475 (1978). In deciding how to proceed in his presentation and framing of the issues for trial, counsel is expected and required to exercise selective judgment. Jones v. Barnes, 463 U.S. 745, 751-53 (1983). He "select[s] the most promising issues," id. at 752, in the light of the substantive rules laid down by statutory and decisional law to govern the adjudication of the case. When the applicable state statute, as authoritatively construed by the highest court of the jurisdiction, tells him that certain issues are off limits, it would be poor selective judgment indeed to prepare and present evidence going to those issues. Thus, counsel's preparation and presentation of evidence constitute both a response to, and an application of, state law. In the present case Cooper's construction of the governing Florida statute told counsel to pretermit the preparation of nonstatutory mitigating evidence, and he did. The statute as construed constituted an external restraint that "adversely affected [the defense] lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Undoubtedly, "the constitutional mandate is addressed to the action of the state." Evitts v. Lucey, \_\_\_\_ U.S. \_\_\_, 105 S.Ct. 830, 836 (1985). But under the unusual circumstances presented here, it was indeed the State, through its restraint of counsel, which "obtain[ed] [Mr. Hitchcock's death sentence] through a procedure that fail[ed] to meet the standards of due process of law." Id.

That a state's statute or procedure may act to hamper counsel's representation in a manner that denies a fair trial, is not a novel proposition. It has been recognized by the Court in a variety of contexts. See United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) (citing cases). "When a State obtains a [death sentence] through such a trial, it is the State that unconstitutionally deprives the defendant of his [life]." Cuyler v. Sullivan, 446 U.S. at 343.

So, in an analogous area, concerning "procedural default,"47

the Court holds that "cause" for a lawyer's performance—noncompliance with a procedural rule—is shown where "some objective factor external to the defense impeded counsel's efforts." Murray v. Carrier, \_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 2639, 2646 (1986). This objective external factor can include, under certain circumstances, the known state of the law. Reed v. Ross, 468 U.S. 1, 17 (1984). Where such "cause" is shown, the State must bear the consequences of a constitutional violation even though counsel's conduct may have contributed to its occurrence.

In Mr. Hitchcock's situation, Florida law as decreed by Cooper with regard to the permissible scope of mitigating factors quite plainly was an "objective factor external to the defense." It involved the construction of a statute that was reasonably seen as "sanctioned," Reed v. Ross, 468 U.S. at 17, indeed required, by Furman. That application was "well entrenched" in Florida at the time, id., and in the prevailing weight of authority, id. Counsel's obedience to it was reasonable. 48

<sup>&</sup>lt;sup>47</sup>There is, of course, no "procedural default" issue in this case. As the Florida Supreme Court said in Mr. Hitchcock's post-conviction appeal:

The record conclusively demonstrates . . . that the limitation on mitigating evidence issue has been raised previously, has been fully considered, and has been found to be without merit.

<sup>432</sup> So.2d at 43 (emphasis supplied).

<sup>48</sup> The case would be quite different, to be sure, if counsel had had the tools to challenge state law upon federal constitutional grounds but had elected not to do so as "a tactical decision to forego a procedural opportunity . . . and then, when he discoversed that the tactic hald been unsuccessful, pursue an alternative strategy in federal court." Reed v. Ross, 468 U.S. at 14. Such conduct by counsel would "seriously implicate . . . the concerns that . . . require deference to a State's procedural bar." Id. at 15. But defense counsel's obedience to an explicit rule of state law precluding the consideration of nonstatutory mitigating circumstances prior to the holding in Lockett that such a rule was federally unconstitutional cannot be construed as such a tactical decision. Rather, "we may confidently assume that [it] . . . was because [counsel's course of action was] . . . sanctioned by [controlling state] . . . law and because [Lockett] . . . was yet [a year and a half] . . . away." Id. at 7. Prior to Lockett, this Court had plainly implied that a state death-penalty statute was permitted and indeed required to provide "standards to guide a capital jury's sentencing deliberations," Gregg v. Georgia, 428 U.S. at 193, in such a way that "the jury's discretion is channeled," id. at 206, and "circumscribed by . . . legislative guidelines," id. at 207. It had invalidated a "mandatory death penalty statute in Woodson [v. North Carolina, 428 U.S. 280 (1976)]... because [such a statute]... permitted no consideration of 'relevant facets of the character and record of the individual offender or the circumstances of the particular offense.' Id., at 304. The Woodson plurality did not attempt to indicate, however, which facets of an offender or his offense it deemed 'relevant' in capital sentencing or what degree of consideration of

One other prudential reason supports the appropriateness of the State bearing the burden of the unconstitutional application of its statute. This involves the nature of the constitutional violation at issue. The Court has expressed a special concern where the "constitutional error . . . precluded the development of true facts . . . [and thus] serve[d] to pervert the jury's deliberations concerning the ultimate question whether [the defendant must be sentenced to death]. "Smith v. Murray, 106 S.Ct. at 2668. Because a Lockett error involves a restriction

'relevant facts' it would require." Lockett, 438 U.S. at 604 (original emphasis). Not until Lockett itself was there any hint that it was beyond the power of a state legislature to guide a capital jury's sentencing deliberations by prescribing what specific characteristics of capital offenses and offenders were to be deemed mitigating.

Plainly, therefore, this is one of those "circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interests," Reed v. Ross, 468 U.S. at 14, and when counsel's obedience to commands of state law whose unconstitutionality was "unknown to him" cannot be attributed to "strategic motives of any sort," id. at 15. Rather, counsel's obedience to the Cooper construction of Florida statutory law before there was a "reasonable basis in existing [federal constitional] law" to challenge Cooper's proscription of the presentation of non-statutory mitigating evidence, id. at 15, is just the sort of conformance to apparently valid state procedural rules which is expected of lawyers, see id. at 15-16, and by which "the cause requirement [of Sykes and Engle] may be satisfied" without doing violence to the concerns of those cases. Reed v. Ross, 468 U.S. at 14.

These conclusions are confirmed by an examination of the caselaw during the period between Proffitt and Lockett. In none of the 34 capital appeals considered by the Florida Supreme Court during this period does the court's opinion disclose a challenge to the Cooper construction of the Florida statute on grounds which anticipate Lockett. (Other constitutional challenges to the Florida statute do appear in a dozen of these cases.) See Appendix C. infra. During the same period, only three of 35 reported opinions of the Ohio Supreme Court and Ohio Court of Appeals reveal challenges to the Ohio statute on the ground that later prevailed in Lockett; and in these three opinions, the challenge is dismissed summarily. (Other constitutional challenges to the Ohio statute were made in all but a half-dozen of these cases.) Id. Claims anticipating Lockett had greater currency in Arizona, where they were raised in two out of 13 cases decided by the Arizona Supreme Court (7 of which raised other constitutional challenges to the Arizona statute), and eventually prevailed in a federal habeas corpus proceeding decided in April of 1978. Id. The emergence of claims such as Lockett's prior to this Court's Lockett decision itself largely dates from the publication of the Pennsylvania Supreme Court's opinion in Commonwealth v. Moody, 382 A.2d 442 (November 30, 1977); they are solecisms prior to that time.

upon the information available to the decisionmaker it concerns an "error [which] undermined the accuracy of the . . . sentencing determination." Id.

Just such a constitutional error has been shown in this case. Mr. Hitchcock alleged that the Florida statute severely curtailed counsel's development and presentation of mitigating evidence, and obliged counsel to shoehorn the limited evidence he did present into the mold of statutory mitigating circumstances. Thus, while counsel presented isolated fragments of what the court of appeals characterized as "the difficult circumstances of petitioner's upbringing," 770 F.2d at 1518; JA 125, these fragments did not reveal the most powerful influence in Mr. Hitchcock's life-his "upbringing in an environment of poverty"—as the court of appeals mistakenly said they did, id., nor did they reveal the uniquely tragic consequences of the death of Mr. Hitchcock's father when he was a young child. 49 A person's life is more than a few unexplained biographical "facts."50 Similarly, while counsel did present, as the court of appeals observed, some of Mr. Hitchcock's positive character traits which vaguely suggested the prospect of rehabilitation, these traits did not begin to paint a full picture of a person who

<sup>49</sup> The evidence of "difficult circumstances" that was presented was summarized by counsel as follows: Mr. Hitchcock grew up in a family of seven children supported by his parents picking and hoeing cotton; his father died when he was six or seven years old; and he left home at the age of thirteen in part because he did not get along with his stepfather. TAS 14-15. As alleged in the habeas petition, however, this evidence would, if fully developed, have shown that Mr. Hitchcock's family were tenant farmers living at a bare subsistence level, with food in scarce supply, with flour sack clothing and no indoor plumbing, and with the children working along with their parents in order to survive. Further, the evidence would have shown the deep, lifechanging upheaval suffered by Mr. Hitchcock as a result of his father's death—that he struggled to rebound from the loss more than did the others, that the loss of the father triggered breakdown of the family since the father had kept the family together and maintained the love relationships within that family, and that when his father was taken from him, Mr. Hitchcock lost his sense of belonging, of family, and of roots.

<sup>50</sup> Cf. Eddings v. Oklahoma, 455 U.S. at 115 ("youth is more than a chronological fact" but rather importantly also reveals the "time and condition of life").

deserved to be spared from execution because of who he was.<sup>51</sup> Moreover, counsel did not argue that these were independently mitigating, TAS 15-17, but tried to shoehorn them into the statutory mitigating circumstance of age and youth. See TAS 23-24 ("there is a chance for this man, who is still young, who is capable [,] to eventually lead a good life").

When analyzed in the way that Mr. Hitchcock presented his claim—and in a way that accurately reflects the principles of Lockett—rather than as the court of appeals misconstrued it and Lockett, this claim unquestionably survives a Rule 4 review. Rather than "bel[ying]" the claim, as the court of appeals held, the record supports the claim. The trial record affirmatively and unequivocally shows that defense counsel acted under the unconstitutional constraints of the Florida death penalty statute, unable to argue the nonstatutory mitigating evidence as independently mitigating and obliged to force this evidence into the mold of statutory mitigating circumstances. <sup>52</sup> Moreover, the allegations of the habeas petition

elaborate what the trial record implies: that counsel felt constrained to argue to the jury that only the statutory mitigatng circumstances could be considered, as such, in determining the sentence, and that, in the absence of such constraint, counsel not only could have argued that the nonstatutory mitigating evidence itself supported a life sentence, but also could have presented much more fully developed and persuasive evidence of the nonstatutory mitigating factors than that tentatively and fragmentarily adduced at the trial. These allegations unequivocally demonstrate "reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is [sentenced to death] . . . illegally and is therefore entitled to relief . . . . " Harris v. Nelson, 394 U.S. 286, 300 (1969). Upon such allegations, a Rule 4 dismissal was improper, for "it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." Id.

#### D. Summary

Stripped of the embellishments of hindsight and speculation, Florida law prior to Lockett can be seen as it actually operated. Florida, together with other states and the weight of commentary, believed that to satisfy Furman it was required to restrict mitigation to an enumerated list of statutory mitigating circumstances, and it did so in clear and mandatory terms. Cooper so held unmistakably. That Florida was reasonable in this view is no more a justification than was Ohio's reasonableness in Lockett.

The case made here, both on the face of the trial record and as further alleged in the petition, is that the restrictive application of the statute severely affected Mr. Hitchcock's sentencing determination. It denied him what the constitution demands: a fair and reliably individualized capital sentencing proceeding.

<sup>51</sup> In light of the record, the court of appeals' statement that Mr. Hitchcock's "solid character traits, devotion to hard work, [and] willingness to contribute to the family's support" were "[a]ll... developed... to some extent for the jury," 770 F.2d at 1518; JA 125, can stand only if "to some extent" means "to a negligible and insignificant extent." With respect to the qualities of Mr. Hitchcock's character, counsel presented—again only in a minute way—evidence of Mr. Hitchcock's nonviolent character, obedience as a child, and honesty. See TAS 15-17. As alleged in the habeas petition, many additional positive traits of character could have been shown, including Mr. Hitchcock's devotion to hard work, generosity, genuine concern for others, and willingness to sacrifice himself for his family and for others. Moreover, direct evidence of his good prospects for rehabilitation could have been presented instead of the mere speculative inferences that were alluded to by counsel. A psychologist experienced in evaluating persons in prison could have presented these findings in compelling detail. See p. 24 n. 41, supra.

<sup>52</sup> The court of appeals' opinion, in one respect, suggests that the record does contradict Mr. Hitchcock's claim even when that claim is accurately framed. The court of appeals suggested, by lifting and connecting phrases out of several pages of counsel's argument, that counsel did argue that the nonstatutory mitigating evidence could be used independently to support a life sentence when counsel argued to the jury to

look at the overall picture. You are to consider every thing together . . . consider the whole picture, the whole ball of wax.

<sup>770</sup> F.2d at 1518; JA 125. This suggestion is misleading, however. An examination of the transcript where that quoted argument appears, TAS 49-52.

reveals plainly that it was an effort to rebut the prosecutor's argument that the jury should use "mathematics" to compute the verdict by summing the number of statutory aggravating and mitigating factors, TAS 43-44. Defense counsel did not refer to any nonstatutory mitigating factors in the argument, but rather was merely trying to describe the weighing process of the Florida capital sentencing scheme. His argument does not in any way contradict Mr. Hitchcock's claim.

The spirit of *Lockett* holds firm that the "character" of a person about to be sentenced for a capital offense, his worth as a human being and his fitness to live, are the crucial questions at this selection stage. Evidence bearing on the kind of person Mr. Hitchcock is would have allowed the jury and judge to see him as a human being. It would have suggested that his personality and motivation could be explained, at least in part, by his stormy and unhappy personal history, and it would have shown that there was a James Hitchcock worth saving. The sentencers here did not have the opportunity to know James Hitchcock's worth before deciding whether to take his life.

II

THE CLAIM THAT THERE IS SYSTEMATIC RACE-OF-VICTIM-BASED DISCRIMINATION IN THE IMPOSITION OF DEATH SENTENCES IN FLORIDA CANNOT BE SUMMARILY DISMISSED WHEN THE STATISTICAL ANALYSIS PROFFERED IN SUPPORT OF THE CLAIM HAS SHOWN A LARGE RACE-BASED DISPARITY, AND TO A SIGNIFICANT EXTENT, HAS ELIMINATED THE MOST COMMON NONDISCRIMINATORY REASONS FOR IT

One of the remaining "badges and . . . incidents of slavery," Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), that still infects contemporary American society is the devaluation of the lives and rights of black people in relation to the lives and rights of white people. In the latter nineteenth and early twentieth centuries, the degradation of black people led to open tolerances for violence committed by whites against blacks. "With no legal or social restraints, white ruffians and sometimes ordinary citizens angered by some incident assaulted blacks without fear of reprisal." Shofner, Custom, Law, and History: The Enduring Influence of Florida's "Black Code," Fla. Hist. Q. 277, 291 (1977). Indeed, this was one of the evils that Congress sought to remedy when it enacted the Civil Rights Act of 1866 and the Ku Klux Klan Act of 1871. See Briscoe v. LaHue, 460 U.S. 325, 337-40 (1983) ("filt is clear from the legislative debates that, in the view of the [Ku Klux Klan] Act's sponsors, the victims of Klan outrages were deprived of 'equal protection of the laws' if the perpetrators systematically went unpunished").

Race discrimination in this form and in other forms "'still remain[s] a fact of life, in the administration of justice as in our society as a whole." Vasquez v. Hillery, \_\_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 617, 624 (1986) (quoting Rose v. Mitchell, 443 U.S. 545, 558-59 (1979)). As Mr. Hitchcock's case and the case of Warren McCleskey demonstrate, it has continued to inform the decision to impose the death sentence for homicide in Florida and Georgia. Society's most severe criminal sanction is still imposed—as it historically has been—significantly less often when the victim of the homicide is black than when the victim is white.

Whether this kind of discrimination is intolerable under the Eighth and Fourteenth Amendments, and if so, whether it can be proven by a systematic (statewide) disparity in the imposition of death sentences that reflects the race of the victim as a significant factor in sentencing decisions, are questions presented directly by McCleskey v. Kemp (No. 84-6811). Although dependent upon the resolution of these questions in McCleskey, Mr. Hitchcock's case presents a more limited question.

In contrast to Mr. McCleskey, Mr. Hitchcock was given no opportunity to prove his claim of arbitrary and discriminatory imposition of the death penalty. Instead, his claim was summarily dismissed "as a matter of law" in the district court pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. JA 72, 87-88.<sup>53</sup> This

<sup>53</sup> His claim had already been summarily disposed of in the state courts, because his allegations "did not constitute a sufficient preliminary basis to state a cognizable claim." Hitchcock v. State, 432 So.2d at 44. With this ruling, the Florida Supreme Court was simply restating its previously-determined basis for resolving this claim, first articulated in Henry v. State, 377 So.2d 692 (Fla. 1979) in reliance upon Spinkellink v. Wainwright, 587 F.2d 582 (5th Cir. 1978). Since Henry, the court has treated the claim summarily, by citation to prior decisions, as it did in Mr. Hitchcock's case. See Adams v. State, 380 So.2d 423, 425 (Fla. 1980); Meeks v. State, 382 So.2d 673, 676 (Fla. 1980); Thomas v. State, 421 So.2d 160, 162-63 (Fla. 1982); Riley v. State, 433 So.2d 976, 979 (Fla. 1983). For subsequent rulings, see n. 76, infra.

dismissal was affirmed in the court of appeals because his claim was based upon "the same statistical study" that the court had previously "rejected" in prior cases and that "[t]he Supreme Court has held . . . to be without merit." JA 106.54

Had the court of appeals' "reject[ion]" of this claim in prior cases been on the basis of evidentiary hearings in the district courts, its ruling in Mr. Hitchcock's case might have been unremarkable. However, its previous rulings were also solely on the basis of the allegations set forth in the pleadings.

Summary dispositions of this sort are allowed only in two circumstances: if, assuming the truth of the allegations, the petitioner is not legally entitled to relief;<sup>55</sup> or if the allegations are "wholly incredible." Given the long-standing condemnation of racial discrimination in criminal proceedings, it is not likely that the court of appeals approved the summary dismissal of Mr. Hitchcock's claim on the basis of his not being entitled to relief as a matter of law. Surely if the allegations are true—that death sentences in Florida are imposed in significant part on the basis of racial considerations—Mr. Hitchcock is entitled to relief. See, e.g., Zant v. Stephens, 462 U.S. 862, 885 (1983); Rose v. Mitchell, 443 U.S. 545, 555 (1979); Gregg v. Georgia, 428 U.S. 153, 212 (1976) (White, J., concurring);

Furman v. Georgia, 408 U.S. at 310 (Stewart, J., concurring); id. at 249-51 (Douglas, J., concurring); id. at 364-66 (Marshall, J., concurring).<sup>57</sup> Thus, the court of appeals' approval of the summary dismissal of Mr. Hitchcock's claim must have been based upon its view that the "statistical study" relied on by Mr. Hitchcock was wholly incredible.

In this light, the court of appeals' ruling raises the following question for determination by the Court: Can the claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida be summarily dismissed as "wholly incredible" when the statistical analysis alleged in support of the claim has shown a large race-based disparity, and to a significant extent, has "eliminate[d] the most common nondiscriminatory reasons" for it, Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)?

If the Court determines in McCleskey that race-of-victimbased discrimination in capital sentencing is forbidden by the Constitution, and that such discrimination can be shown by a systematic disparity in the impositon of death sentences that reflects the race of the victim as a significant factor in sentencing decisions, the question presented by Mr. Hitchcock must be decided. The Court's analysis of the sufficiency of the evidence to prove discrimination in McCleskey will not control the analysis of this question, because the question presented here goes to the allegations necessary to state a prima facie case of discrimination, not to whether that case has been proved by a preponderance of the evidence in light of all the evidence adduced by both parties in an evidentiary hearing. Whether a claimant has stated a prima face case depends solely upon the allegations made by the claimant. If the unrebutted allegations would permit a rational trier of fact to find discrimination, they are not "wholly incredible" and must be considered in the adversarial testing process of an evidentiary hearing. Burdine,

<sup>54</sup> The court of appeals cited Wainwright v. Ford, 467 U.S. 1220 (1984) and Sullivan v. Wainwright, 464 U.S. 109 (1983) as authority for the Court's "holding." However, both cases concerned the denial of stays of execution on this ground. In neither case did the Court grant certiorari as to this issue. Accordingly, these decisions do not stand for the proposition for which they were cited. Similar to a denial of certiorari, the denial of a stay "may not be taken... as a statement... on the merits." Graves v. Barnes, 405 U.S. 1201, 1204 (1972) (Powell, J., in chambers). See also Alabama v. Evans, 461 U.S. 230, 236 n.\* (1983) (Marshall, J., dissenting) (same). Notwithstanding, the court of appeals has continued to treat Ford and Sullivan as rulings upon the merits. See, e.g., McCleskey v. Kemp, 753 F.2d 877, 897 (11th Cir. 1985) (en banc) (in these cases, "the Supreme Court looked at the bottom line indication of racial effect and held that it simply was insufficient to state a claim" (emphasis supplied)).

 <sup>55</sup> See Machibroda v. United States, 368 U.S. 487, 495-96 (1962); Townsend
 v. Sain, 372 U.S. 293, 307, 312 (1963).

<sup>&</sup>lt;sup>56</sup> See Machibroda v. United States, 368 U.S. at 495-96; Blackledge v. Allison, 431 U.S. 63, 74, 76 (1977).

<sup>&</sup>lt;sup>57</sup> Just last Term, the Court emphasized that the Constitution cannot tolerate even the "risk of racial prejudice infecting a capital sentencing proceeding. . . ." Turner v. Murray, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 S.Ct. 1683, 1688 (1986) (emphasis supplied).

450 U.S. at 254 n.7 ("[t]he phrase 'prima facie case' . . . describe[s] the plaintiffs burden of producing enough evidence to permit the trier of fact to infer the fact at issue"). In contrast, whether a claimant has proved discrimination by a preponderance of the evidence in such a hearing "will depend in a given case on the factual context of each case in light of all the evidence presented by both the [claimant] and the [respondent]." Bazemore v. Friday, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 S.Ct. 3000, 3009 (1986). Accordingly, whether Mr. McCleskey has proved discrimination cannot be determinative of whether Mr. Hitchcock has stated a prima facie case of discrimination.

In the remainder of his brief, Mr. Hitchcock will discuss the allegations presented in support of his claim and will then show why these allegations could not fairly have been dismissed without appropriate evidentiary consideration.

# A. Mr. Hitchcock's Prima Facie Case: The Statistical Analysis Alleged In Support Of His Claim

In support of his claim in the district court, Mr. Hitchcock presented the findings of a multivariate statistical analysis conducted by Professor Samuel Gross and Professor Robert Mauro.<sup>58</sup> Comparing the data reported to the FBI by local police agencies concerning all homicides in Florida and seven other states<sup>59</sup> between 1976 and 1980, with similar data concerning the homicides during this period for which death sentences were imposed, Professors Gross and Mauro examined

the effects of eight independent variables upon the sentencing outcomes of all homicides during this five-year period.<sup>60</sup>

Initially, Gross and Mauro found that 43.3% of the victims of homicide in Florida during this period (1683 out of 3486) were black, but only 10.9% of the death sentences (14 out 128) were imposed for black-victim homicides. Id. at 55. To determine whether non-racial factors might explain this extreme racebased disparity. Gross and Mauro examined eight factors for their individual and cumulative impact on the death sentencing determination: (1) the race of the defendant; (2) the race of the victim: (3) the commission of the homicide in the course of a felony; (4) the relationship of the offender and victim (stranger or nonstranger); (5) the killing of multiple victims; (6) the killing of a female victim; (7) the use of a gun; and (8) the location of the homicide (urban or rural). Id. at 49-66.61 They found that five of these factors had a "strong aggregate effect" on the likelihood that a death sentence would be imposed: the commission of a homicide in the course of another felony, the killing of a stranger, the killing of multiple victims, the killing of a white victim, and the commission of the homicide by a black suspect. Id. at 55-56.62

Because the three non-racial factors were so highly correlated with death sentences, Gross and Mauro explored whether

<sup>58</sup> During the pendency of proceedings in the district court, the only available report of Professor Gross' and Professor Mauro's study was a "Tentative Draft" (dated June 29, 1983). Mr. Hitchcock filed this report in the district court as a supplemental appendix "to show a prima facie basis for [his] claim and in order to show a prima facie basis for an evidentiary hearing, payment of expert fees, . . . and for discovery concerning this issue." R 1111. The study has since been published as Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27 (Nov. 1984). References herein will be to the study as published.

<sup>&</sup>lt;sup>59</sup> The other states were Arkansas, Georgia, Illinois, Mississippi, North Carolina, Oklahoma, and Virginia. 37 Stan. L. Rev. at 49.

<sup>&</sup>lt;sup>60</sup> The data concerning all homicides was collected from Supplementary Homicide Reports that are filed with the FBI by local police agencies, and the data concerning homicides for which the death sentence was imposed was collected from *Death Row U.S.A.*, published by the NAACP Legal Defense and Educational Fund. 37 Stan. L. Rev. at 49-50. The process by which the researchers matched the homicides as reported to the FBI with the homicides for which death sentences were imposed is described at 50-54.

<sup>&</sup>lt;sup>61</sup> These factors were identified because they are the subject of the FBI's Supplementary Homicide reports. *Id.* at 49.

<sup>&</sup>lt;sup>62</sup> While the raw data showed that white homicide suspects were, on the whole, about twice as likely to be sentenced to death as black suspects, "the relationship between the suspect's race and the likelihood of a death sentence appears to be due entirely to the fact that black suspects were more likely to kill black victims and white suspects were more likely to kill white victims. Indeed, when we control for the race of the victim, blacks who killed whites were several times more likely to be sentenced to death than whites who killed whites in each state." *Id.* at 55-56.

any of these factors individually might explain the striking disparity in sentencing which appeared to occur because of the race of the suspect and victim. None did. Even when a non-racial factor highly associated with capital sentencing was present, the homicides which, in addition, involved white victims or both black suspects and white victims, were much more likely to result in death sentences. *Id.* at 56-61.<sup>63</sup>

In order to determine whether the racial disparities might be explained by a combination of the highly predictive, non-racial aggravating factors acting together, Gross and Mauro undertook two additional investigative steps involving multivariate analysis. *Id.* at 66-69. First, they examined for the cumulative effect of these variables by using a "scale of aggravation." *See id.* at 70-75 (categorizing all homicide cases by number of major aggravating factors present—0, 1, or 2-3). While this analytical step explained away the race-of-suspect disparity, the race-of-victim disparity persisted just as strongly. Gross' and Mauro's findings on the "scale of aggravation" were also of extraordinarily high statistical significance. *Id.* at 74.65 Second, they undertook a multiple regression anal-

ysis of the known variables affecting a Florida capital sentencing decision. *Id.* at 75-83.<sup>66</sup> Through this analysis, Gross and Mauro found, as well,

large and statistically significant race-of-victim effects on capital sentencing in . . . Florida. . . . After controlling for the effects of all of the other variables in our data set, the killing of a white victim increased the odds of a death sentence by an estimated factor of . . . about five in Florida. . . .

#### Id. at 83 (emphasis supplied).67

To determine whether appellate review may have resulted in a correction of the wide racial disparities found at the trial level, Gross and Mauro also analyzed the racial patterns of death sentences affirmed by the Florida Supreme Court compared to the racial patterns of all homicides, controlling in the process for the most predictive non-racial aggravating factors. They found that the disparity between white-victim death sentences and black-victim death sentences persisted at a ratio of six to one (2.2% to 0.4%) and could not be explained by any of the non-racial predictors of capital sentencing. *Id.* at 90.

Before reaching their conclusions on the basis of these findings, Gross and Mauro undertook two additional steps of analy-

<sup>63</sup> There was one exception to this finding with respect to the race of the suspect. "Controlling for both race of the suspect and felony circumstance does not dilute the capital sentencing disparities by race of victim but it does change the race-of-suspect pattern[:]... there are no substantial differences in capital sentencing rates between blacks who kill whites and whites who kill whites [in the course of committing a felony] in Florida." Id. at 57-58.

<sup>&</sup>lt;sup>64</sup> "Controlling for level of aggravation... essentially eliminates any independent race-of-suspect effect. [The data] reveal[] only small and inconsistent differences in death sentencing rates between blacks who killed whites and whites who killed whites, at each level of aggravation." *Id.* at 71.

<sup>65</sup> Gross and Mauro report the overall level of statistical significance as p. <.001, and explain the concept of statistical significance (in terms of the "p-value") and the meaning of it at 71 n.118. While the Court is familiar with the meaning of statistical significance, its prior decisions have discussed significance in terms of "two or three standard deviations." See, e.g., Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977) ("As a general rule for . . . large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations," that difference can be properly deemed not due to chance but instead to the operation of the factor tested for). Professors Baldus and Cole have explained that a rule requiring two or three standard deviations "is essentially equivalent to a rule requiring significance [in terms of "p-value"] at a level in the range below 0.05</p>

or 0.01." D. Baldus & J. Cole, Statistical Proof of Discrimination 295-97 (1980). Thus the overall level of statistical significance reported by Gross and Mauro for the "scale of aggravation" analysis, p. <.001, is ten times stronger than the level of significance required by the Court in Castaneda to support an inference of discrimination.

<sup>&</sup>lt;sup>66</sup> See generally Bazemore v. Friday, 106 S.Ct. at 3008-3009 (explaining that multiple regression analysis is an appropriate evidentiary tool for the proof of discrimination because of its capacity to account for non-discriminatory factors that might explain racially disparate results).

<sup>67</sup> As Gross and Mauro explained, "In multiple regression, the coefficients of the independent variables are estimates of the size of the effects of these variables on the outcome variable. . . . [T]hese coefficients can be reexpressed in a more accessible form—as multipliers of the odds of the outcome. . . . [Thus,] [i]n Florida the overall odds of an offender receiving the death penalty for killing a white victim were 4.8 times greater than for killing a black victim." Id. at 77-79 (emphasis supplied). The statistical significance for the results of this regression analysis was also p. <.001, again, ten times stronger than the Castaneda threshold. See n. 65, supra.

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sis. First they considered whether information not included in their data might explain the racial disparities on non-racial grounds. In this regard, they reasoned that in order for an omitted variable to change the findings to any significant degree, the variable would have to meet three conditions: "(1) it must be correlated with the victim's race; (2) it must be correlated with capital sentencing; and (3) its correlation with capital sentencing must not be explainable by the effects of the variables that are already included in our analysis." *Id.* at 100. After analyzing several omitted variables in relation to these conditions, <sup>68</sup> they concluded: "[W]e are aware of no plausible [omitted variable] that might explain the observed racial patterns in capital sentencing in legitimate nondiscriminatory terms." *Id.* at 102.

Second, Gross and Mauro considered the findings of other research in order to assess the validity of their findings. They concluded that the findings of other research conducted in Florida "closely parallel" their findings showing a sizable race-of-victim-based disparity in capital sentencing. *Id.* at 102.69

Further, the findings of other research confirm "that the racial patterns in capital sentencing that we have observed from 1976 through 1980 have been stable phenomena in . . . Florida . . . ." Id.<sup>70</sup>

With respect to research conducted in Georgia and Mississippi, Gross and Mauro found not only further confirmation of their findings, but more significantly, strong confirmation of the validity of their analytical methodology. The Baldus study in Georgia and the Berk study in Mississippi considered many more sentencing variables than Gross' and Mauro's study—"as many variables as one could ever hope to collect [information on] in a study of sentencing practices." *Id.* at 104-105. Since the major question concerning the validity of their study was the impact of omitted variables, Gross and Mauro believed it crucial to examine the effects on racial disparities of the inclusion of variables they could not take into account. Because Gross' and Mauro's study had also focused upon Georgia and Mis-

<sup>&</sup>lt;sup>68</sup> These included the strength of the evidence of the defendant's guilt and the criminal record of the defendant. *Id.* at 101.

<sup>69</sup> Gross and Mauro here cite to Bowers & Pierce, Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 26 Crime & Deling. 563 (1980). 37 Stan. L. Rev. at 102. However, their earlier discussion of four other Florida studies, id. at 43-44, shows that the findings of other researchers as well were identical concerning the race-of-victim effect on capital sentencing decisions. See Note, Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976, 33 Stan. L. Rev. 75 (1980); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456 (1981); Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (1981); Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases [now published at 19 Law & Soc. Rev. 587 (1985)]. While not cited by Gross and Mauro, three other studies have found the same racial effects. See Foley, The Effect of Race on the Imposition of the Death Penalty (paper presented to symposium of the American Psychological Association, September 1979) [proffered by Mr. Hitchcock in the district court as an appendix to his habeas petition, see JA 25-26]; Foley & Powell, The Discretion of Prosecutors, Judges, and Juries in Capital Cases, 7 Crim. Just. J. 16 (1982); Bowers, The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes, 74 J. Crim. L. & Criminology 1067 (1983).

<sup>&</sup>lt;sup>70</sup> This is so because the data analyzed in all of the other studies (except the Arkin study, 33 Stan. L. Rev. 75) was for the period 1972-1978 and was collected through a different process than that utilized by Gross and Mauro: It was collected by a field investigation method similar to that employed by Professor Baldus in Georgia. See Radelet & Pierce, supra, 19 Law & Soc. Rev. at 595-96. The process of data collection and the kind of data collected were described in Foley & Powell, supra, 7 Crim. Just. Rev. at 17-18:

The information was gathered from court records by law students using a standard form. The data consisted of demographic information on the offender and victim, information concerning the offense, and information concerning the trial and its outcome. The demographic information consisted of: age, race, sex, education (of defendant and victim), occupation (of defendant and victim-unemployed, illegal occupation, unskilled, skilled, or professional), and prior convictions of defendant (none, misdemeanors, felony). Information collected on the offense included: crime as charged (every case studied was an indictment for first degree murder), additional offenses (whether or not there were any accomplices), county, and circumstances of the crime (spouse on spouse, parent on child, victim is other member of family, argument over money, argument while drinking, lovers quarrel, quarrel with someone other than lover, felony, possible felony), relationship between the defendant and victim (relative; lover; ex-spouse; estranged spouse or ex-lover; lover of spouse, ex-spouse, or present lover; friend; acquaintance; none), and weapons used (firearms, knives, other weapon, or hands). Information on the trial included: whether the trial was held or charges were dismissed, whether defendant pleaded guilty or not guilty, type of attorney (public defender, court appointed, or private), sentence recommended by jury, and sentence given by the judge.

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sissippi, the studies by Baldus and Berk in those two states provided the opportunity. In comparing their findings in Georgia and Mississippi to the findings of Baldus and Berk, Gross and Mauro noted

two important facts: (1) The race-of-victim coefficient remains statistically significant regardless of the other variables included in the equations. (2) After controlling for the variables in our study, the introduction of any number of additional control variables either has little impact on the magnitude of the race-of-victim effect, or else it increases the size of the race-of-victim disparities.

Id. at 104; see also id. at 104-105. Accordingly, Gross and Mauro concluded that

the consistency between the Baldus and Berk findings and our own . . . validates our methodology. . . . The major potential problem with our study is the impact of omitted variables; the Baldus study indicates that given the variables that are reported in our data and analyzed in this article, it is unnecessary to our conclusion to control for other variables which are missing.

Id. at 105.71

On the basis of these analytical steps, Gross and Mauro concluded that "[t]he major factual finding of this study is simple: There has been racial discrimination in the imposition of the death penalty under [Florida's] post-Furman statute[]. . . . The discrimination that we found is based on the race of the victim, and it is a remarkably stable and consistent phenomenon. . . " Id. at 105.

#### B. The Allegations Set Forth In Support Of Mr. Hitchcock's Claim Are Not "Wholly Incredible" And Thus Are Not Subject To Summary Dismissal

A claim supported by factual "allegations [which], if proved, would establish the right to habeas relief," Townsend v. Sain, 372 U.S. at 307, may nevertheless be dismissed summarily if those allegations are "wholly incredible," Blackledge v. Allison, 431 U.S. at 74. "The critical question is whether [the] allegations, when viewed against the record . . . [are] so 'palpably incredible,' . . . so 'patently frivolous or false,' . . . as to warrant summary dismissal." Id. at 76 (citations omitted). Factual allegations are not wholly incredible under this test simply because they may appear "improbable." Machibroda v. United States, 368 U.S. at 495-96. Thus, if "the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible," id. at 496, the claim which rests upon those allegations must receive appropriate evidentiary consideration.

When fairly considered, Mr. Hitchcock's claim, based upon the Gross-Mauro study and other studies of Florida capital sentencing decisions, cannot be found "wholly incredible."

As noted, the Court will determine in McCleskey whether race discrimination in capital sentencing can be shown by a systematic disparity in the imposition of death sentences that reflects the race of the victim as a significant factor in sentencing decisions. If discrimination can be shown by such evidence, a claimant's allegations must be "sufficient" in two respects in order to survive summary dismissal. First, the allegations must reveal racial disparities of a sufficient magnitude to permit the factfinder to infer that race has been a consideration in the imposition of death sentences. Second, the petitioner's allegations must sufficiently eliminate the potential nondiscriminatory reasons for the racial disparities to permit the factfinder to infer that the disparities are "unexplainable on grounds other than race," Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). While significant racial disparities alone would be enough in some circumstances to permit the inference of dis-

<sup>&</sup>lt;sup>71</sup> To a lesser extent than the Baldus and Berk studies, but still to a significant extent, studies by Foley and Powell (1982) and Bowers (1983), see n. 69, supra, lend further corroboration to the Gross-Mauro methodology for these same reasons. Because the Foley-Powell and Bowers studies utilized field investigation to collect data, see n. 70, supra, these studies analyzed the effects of more independent variables—fourteen in the Foley-Powell study, 7 Crim. J. Rev. at 18, and seventeen in the Bowers study, 74 J. Crim. L. & Criminology at 1072-73—yet still found sizable race-of-victim disparities in capital sentencing. Foley & Powell, at 19, 21; Bowers, at 1074, 1080, 1085.

crimination, id. at 266 & n.13, these circumstances have been limited to cases involving "stark" disparities like those presented in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 1073 (1886) (ordinance excluding 100% of Chinese citizens and 0% of non-Chinese citizens from further conduct of laundry business) and Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (statute redefining the boundaries of Tuskegee, Alabama to "remove from the city all save four or five of its 400 Negro voters while not removing a single white voter"), and to jury composition cases which, though involving less extreme disparities, permit an inference of discrimination "[b]ecause of the nature of the jury-selection task. . . . " Village of Arlington Heights, 429 U.S. at 266 n.13. Neither of these circumstances is presented here, for the disparities are not as stark as those in Yick Wo or Gomillion, 72 and the jury selection task is far simpler than the capital sentencing task. 73 Accordingly, "a litigant who wishes to prove racial discrimination in sentencing must also show that plausible nonracial factors do not explain any apparent racial disparity." Gross, 18 U.C.D. L. Rev. at 1310.

Mr. Hitchcock's allegations reveal that the magnitude of the race-based disparity in capital sentencing in Florida is virtually identical to the magnitude of the disparity in Georgia. After multiple regression analysis of the Florida data, Gross and Mauro found that the likelihood of receiving a death sentence in Florida for killing a white victim was 4.8 times greater than for killing a black victim. Using the same methodology, Baldus found a 4.3 times greater likelihood of death for killing a white victim in Georgia. McCleskey v. Kemp, 753 F.2d at 897.74

In McCleskey, the court of appeals held that a racial disparity of this magnitude was insufficient to permit an inference that race has been a consideration in the imposition of capital punishment. Id. at 896-97. As Mr. McCleskey has demonstrated in his brief before this Court, however, in reaching this conclusion the court of appeals misunderstood the disparity reflected by these figures and severely mis-appraised its magnitude. 75 See also Gross, 18 U.C.D. L. Rev. at 1304-08 (showing the extraordinary magnitude of discrimination reflected by these figures in comparison to similar "odds" figures in other contexts). If the Court finds in McCleskey that a race-based disparity of this magnitude in capital sentencing is of constitutional concern-as Mr. Hitchcock submits it is-Mr. Hitchcock's allegations will have revealed racial disparities of a sufficient magnitude to permit the factfinder to infer that race has been a consideration in capital sentencing decisions in Florida. Accordingly, this aspect of the prima facie case will have been shown by Mr. Hitchcock's allegations.

Analysis of the other material aspect of Mr. Hitchcock's allegations—whether they sufficiently eliminate the potential nondiscriminatory reasons for racial disparities to permit the factfinder to infer that the disparities are "unexplainable on grounds other than race"—leads to the same conclusion. Critically, the Court's prior decisions demonstrate that allegations of racial discrimination are not "wholly incredible" even though the claimant's statistical analysis does not eliminate all of the nondiscriminatory factors that might explain a racial disparity.

While the statistical analysis must "eliminate[] the most common nondiscriminatory reasons" for the racial disparity, Texas Department of Community Affairs v. Burdine, 450 U.S. at 254 (emphasis supplied), it is not required to eliminate every

To comparison to those cases, where the disparities were or nearly were 100 percentage points, the racial disparity in Florida's capital sentencing decisions is 32.4 percentage points (43.3% of homicide victims are black but only 10.9% of all the death sentences imposed are for black-victim homicides).

<sup>&</sup>lt;sup>73</sup> See Gross, Race and Death: The Judicial Evaluation of Evidence of Discrimination in Capital Sentencing, 18 U.C.D. L. Rev. 1275, 1309-1310 (1985) (explaining why racial disparity alone can permit the inference of discrimination in jury-selection cases, since "no criteria other than eligibility are supposed to be considered," and in contrast, why racial disparity alone cannot permit a similar inference in capital cases, since "many factors are supposed to be considered in sentencing").

<sup>&</sup>lt;sup>74</sup> The method for computing this expression of "odds" is described by Gross and Mauro, *supra*, 37 Stan. L. Rev. at 77.

<sup>75</sup> The court of appeals also gave undue weight and speculative meaning to the Court's orders denying stays or disapproving grounds for stays in Sullivan v. Wainwright, 464 U.S. 109 (1983); Wainwright v. Adams, 466 U.S. 964 (1984); and Wainwright v. Ford, 467 U.S. 1220 (1984), when it reasoned that its "conclusion [respecting the insufficiency of the magnitude of racial disparity] is supported, and possibly even compelled, by recent Supreme Court opinions in [those cases]." Id. at 897. See n. 54, supra.

conceivable reason—either for the claimant to survive summary dismissal or for the claimant to prevail in an evidentiary hearing. See also Bazemore v. Friday, 106 S.Ct. at 3009. That there may be "many [other] factors goling] into" the allegedly discriminatory decisions does not defeat the prima facie case if it is otherwise sufficient to permit an inference of discrimination. Id. at 3010 n.14. While respondents may defend against a prima facie case on this basis in an evidentiary hearing, they cannot defeat it by simply "declar[ing] . . . that many [other] factors go into" the decisions. Id. Rather, they must "demonstrate that when these [other] factors [are] properly organized and accounted for there [is] no significant disparity . . . . " Id. (emphasis supplied). Accordingly, if the claimant's statistical analysis eliminates the most common nondiscriminatory explanations for discrimination, he or she is entitled to proceed to an evidentiary hearing, where all of the nondiscriminatory explanations deemed relevant by the parties can be presented, and in light of both parties' analyses, the trier of fact can determine whether "it is more likely than not that impermissible discrimination exists. . . . " Id. at 3009.76

Mr. Hitchcock's allegations plainly meet these threshold requirements. The studies by Gross and Mauro and other Florida researchers have explicitly taken into account the "most common" nondiscriminatory reasons for capital sentencing disparities based on race. As Gross and Mauro found, killing during the commisssion of a felony, killing multiple victims, and killing a stranger are all nondiscriminatory factors highly predictive of —that is, among the most common reasons for—a death sentence. Yet when these factors are taken into account, the likelihood of a defendant receiving the death sentence remains almost five times greater if the victim is white instead of black.<sup>77</sup>

mss v. Wainwright, 734 F.2d 511 (11th Cir. 1984), and Ford v. Wainwright. 734 F.2d 538 (11th Cir. 1984), that executions should be stayed pending its en banc decision in McCleskey in order to determine in light of McCleskey whether the Gross-Mauro study entitled Florida petitioners to evidentiary hearings, the Court's dissolution of the stay in Adams, Wainwright v. Adams, 466 U.S. 964 (1984), and rejection of this ground as a basis for the stay in Ford, Wainwright v. Ford, 467 U.S. 1220 (1984), convinced the Eleventh Circuit that its analysis in Sullivan had been correct. See Washington v. Wainwright, 737 F.2d 922, 923 (11th Cir. 1984); Henry v. Wainwright, 743 F.2d 761, 762 (11th Cir. 1984); Hitchcock v. Wainwright, 745 F.2d at 1342; Ford v. Wainwright, 752 F.2d 526, 527 n.2 (11th Cir. 1985); Thomas v. Wainwright, 767, F.2d 738, 747-48 (11th Cir. 1985). The only exception to this consistent rule was Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985), cert. denied, 106 S.Ct. 1992. vacated on other grounds, 106 S.Ct. 1964 (1986), which remanded for the district court to consider "whether an evidentiary hearing is required [in light of the en banc opinion in McCleskeyl." Id. at 1518.

77 It should be noted as well that Gross' and Mauro's accounting for the relationship between the defendant and the victim has eliminated two of the four factors presented by the State of Florida, in Spinkellink v. Wainwright, supra, as the nondiscriminatory reasons for the race-of-victim disparity in Florida's capital sentencing decisions. "As a general rule, the State contended, murders involving black victims have not presented facts and circumstances appropriate for imposition of the death penalty. . . [,][such murders] hav[ing] in the past fallen into the category of 'family quarrels, lovers quarrels, liquor quarrels, [and] barroom quarrels." 578 F.2d at 612 & n.37. Taking into account only homicides in which the defendant and the victim were strangers, however—thus eliminating homicides arising from family quarrels or lovers' quarrels—Gross and Mauro found that even in such circumstances, a death sentence was five times more likely to be imposed when the victim was white instead of black.

When Foley and Powell, and thereafter Bowers, controlled for the other two nondiscriminatory factors urged by the State—"liquor quarrels and barroom quarrels"—the race-of-victim disparities remained and were just as sizable. See Foley and Powell, n. 69, supra, at 18-22; Bowers, n. 69, supra, at 1073-75, 1078-81, 1083-86.

<sup>76</sup> Of course, the respondent in Mr. Hitchcock's case has never been required to make such a showing, since there has been no evidentiary hearing in the state or federal courts on his claim of discrimination. Indeed, since Mr. Hitchcock's presentation of the Gross-Mauro study in the district court on July 8, 1983, the study has been presented in numerous state and federal collateral proceedings, and to date, no court has held an evidentiary hearing to consider it. The Florida Supreme Court has consistently held, as with similar allegations predating the Gross-Mauro study, see n. 53, supra, that this study "do[es] not constitute a sufficient preliminary factual basis to state a cognizable claim" since being first presented with it in Sullivan v. State, 449 So.2d 609, 614 (Fla, 1983). See Adams v. State, 449 So.2d 819, 820-21 (Fla. 1984); Ford v. Wainwright, 451 So.2d 471, 474-75 (Fla. 1984); Jackson v. State, 452 So.2d 533, 536 (Fla. 1984); State v. Washington, 453 So.2d 389. 391-92 (Fla. 1984); Dobbert v. State, 456 So.2d 424, 429 (Fla. 1984); State v. Henry, 456 So.2d 466, 468 (Fla. 1984); Smith v. State, 457 So.2d 1380, 1381 (Fla. 1984); Sireci v. State, 469 So.2d 119, 120 (Fla. 1985); Bundy v. State. \_ So.2d \_\_\_\_\_, 11 F.L.W. 294 (Fla. 1986).

Similarly, the Eleventh Circuit held that no hearing was required when first presented with the Gross-Mauro study because it showed "nothing more than the statistical impact type case . . . previously held not sufficient to show the Florida system to have intentionally discriminated against petitioner." Sullivan v. Wainwright, 721 F.2d 316, 317 (11th Cir.), stay denied, 464 U.S. 109 (1983). Though the Eleventh Circuit expressed the view thereafter, in Ada-

Moreover, the capital sentencing studies in Georgia and Mississippi by Baldus and Berk—which have eliminated all or virtually all of the potential nondiscriminatory reasons for racial disparities in capital sentencing—and the capital sentencing studies in Florida undertaken by Foley, Powell, and Bowers—which have eliminated potential nondiscriminatory reasons for these racial disparities in addition to those eliminated by Gross and Mauro—have led to identical findings concerning race-of-victim disparities. The disparities found by Gross and Mauro in Georgia, Mississippi, and Florida have not been reduced or explained when additional explanatory factors have been taken into account. Thus, it is reasonable to infer, as Gross and Mauro have, that their Florida study is just as valid an assessment of sentencing decisions.

Having demonstrated racial discrimination of an unconstitutional magnitude and having eliminated the most common non-discriminatory factors that might explain away the racial disparities in Florida's capital sentencing decisions, Mr. Hitchcock's proffered statistics manifestly permit an inference of discrimination. Nothing more can be or should be required in order for a habeas claim to survive summary dismissal under the teaching of Machibroda and Blackledge. There is, however, an additional compelling reason for this conclusion in Mr. Hitchcock's case: the "unique opportunity for racial prejudice to operate but remain undetected" in capital sentencing proceedings. Turner v. Murray, 106 S.Ct. at 1687.

As the Court recognized in *Turner*, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." *Id*. Since "[t]he risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence," *id*. at 1688, the Court was unwilling to tolerate that risk in a capital sentencing proceeding, even though it has been willing to tolerate it to a limited extent in non-capital trials. *Id*. at 1688 n.8 (distinguishing *Ristaino* v.*Ross*, 424 U.S. 589 (1976)).

What is shown starkly by Mr. Hitchcock's allegations is a far greater "risk of racial prejudice influencing . . . capital sen-

tencing proceeding[s]" than was shown in *Turner*. The only showing of this risk in *Turner* was that the defendant was black and the victim white. *Id.* at 1694-95 (Powell, J., dissenting). There, in contrast, there are substantial and detailed factual allegations showing not only a greater risk of racial prejudice affecting capital sentencing, but also an actual, measurable (and measured) effect of racial prejudice upon capital sentencing proceedings during the very period within which Mr. Hitchcock was tried and sentenced.

The teaching of *Turner* is plain in relation to Mr. Hitchcock's claim. Because of the unique opportunity for racial prejudice to operate in capital sentencing proceedings, as well as the unique seriousness of its operation in this context, the Constitution requires greater attentiveness to the risk that racial prejudice may have been a factor in capital sentencing determinations. Where, as here, a methodologically-sound statistical analysis has found marked and systematic racial effects upon capital sentencing decisions, the claim drawn from that analysis is at least entitled to evidentiary consideration.

This consideration need not, of course, entail wide-ranging and cumbersome procedures. As Justice Brennan has recently observed, "[the Court has] long recognized that federal courts may employ intermediate factfinding procedures in determining whether a full hearing is necessary." Vincent v. Louisiana, \_\_\_\_\_\_ U.S. \_\_\_\_\_, 105 S.Ct. 928, 930 (1985) (dissenting from denial of certiorari). Among such procedures provided by the Habeas Corpus Rules are the limited use of discovery, Rule 6; the expansion of the record by, among other things, "answers under oath . . . to written interrogatories propounded by the judge," Rule 7(b); and prehearing conferences to "'limit the questions to be resolved, identify areas of aggreement, and explore evidentiary quesitons that may be expected to arise . . ," Advisory Committee's Note to Habeas Corpus Rule 8.

<sup>&</sup>lt;sup>78</sup> Indeed Justice Powell indicated that the demonstration of this risk would have been stronger had Turner presented studies—apparently similar to the Gross-Mauro study—"purport[ing] to show that a black defendant who murders a white person is more likely to receive the death penalty than other capital defendants . . . in Virginia." *Id*.

Id. Accord Blackledge v. Allison, 431 U.S. at 81-83; Machibroda, 368 U.S. at 495. Indeed Mr. Hitchcock tried to utilize such procedures by filing a request for discovery in the district court directed to limiting the issues in dispute—requesting that the respondent enumerate "other factors... [that] may legitimately explain the disparities thus far revealed" and provide the data from the State's own records that would permit analysis of these factors. JA 33-34.

Such requests are routine in other contexts and are the bedrock upon which the factual disputes between the parties are narrowed. See Bazemore v. Friday, 106 S.Ct. at 3008 (noting that "[p]etitioners selected the[] variables [utilized in their regression analyses] based on discovery testimony by [respondents' employee] that four factors were determinative of salary"). Their utility in eliminating more costly procedures is well-recognized. See Note, Developments in the Law—Federal Habeas Corpus, 83 Harv. L.Rev. 1038, 1181 (1970). Their these intermediate factfinding procedures are critical to assuring the "careful consideration and plenary processing of [the claim,] including full opportunity for presentation of the relevant facts," to which Mr. Hitchcock is entitled. Blackledge v. Allison, 431 U.S. at 82-83 (quoting Harris v. Nelson, 394 U.S. 286, 298 (1969)). 80

For these reasons, the dismissal of Mr. Hitchcock's claim without evidentiary consideration was error, requiring a remand for such consideration.

#### C. Conclusion: The Enduring Influence Of Race Discrimination

Among southern states, Florida has been extreme in its degradation of black people. Its approval of and reliance upon slavery, resistance to Reconstruction, devotion to white supremacy, enactment of Black Codes and innumerable other discriminatory statutes, and resistance well into the mid-years of this century to eradicating the badges and incidents of slavery, are well-documented. See, e.g., Shofner, Custom, Law, and History: The Enduring Influence of Florida's "Black Code", Fla Hist. Q. 277 (Jan. 1977) (focusing upon this history-between 1865 and 1965); Vandiver, Race, Clemency, and Executions in Florida: 1924-1966 (Dec. 1983) (Unpublished Master's Thesis, Florida State University) (copy provided to the Clerk of the Court).81

A persistent feature of this heritage has been official approval of and tolerance for violence against black people. As described by Professor Shofner, this method of subjugating black people became "firmly entrenched" after the failure of Reconstruction.

As the possibility of United States intervention diminished in the 1880's and the doctrine of white supremacy became more firmly entrenched, violence as a means of repressing blacks increased. The brutal Savage-James

<sup>&</sup>lt;sup>79</sup> With the research already conducted by Gross and Mauro and other social scientists in Florida—and validated by the far more extensive research in Georgia and Mississippi—the utility of these intermediate factfinding procedures is especially apparent. Entire data sets like those constructed in Georgia and Mississippi need not be constructed in Florida. Instead, the particular nondiscriminatory factors that Florida officials believe will explain away the racial disparities can be identified, analyzed, and focused upon in a limited evidentiary hearing.

<sup>&</sup>lt;sup>80</sup> This is particularly so with respect to this issue, for as Professor Gross has noted elsewhere, "[p]roof of discrimination in capital sentencing depends on studies that are far beyond the means of any capital defendant." Gross, supra, 18 U.C.D. L. Rev. at 1288. For an indigent like Mr. Hitchcock, this disability is insuperable. However, given the extent of the research already conducted in Florida—and the validation of Gross' and Mauro's methodology by the Baldus research in Georgia and the Berk research in Mississippi—the proof of discrimination in Florida should not and need not entail the undertaking of new studies "that are far beyond the means of any capital defendant." See n. 79, supra.

<sup>81</sup> See also McLaughlin v. Florida, 379 U.S. 184 (1964) (state statute prohibiting interracial cohabitation); Debra P. v. Turlington, 474 F. Supp. 244, 251 & n.13 (M.D. Fla. 1979), aff d in pertinent part, 644 F.2d 397, 407 & n.15 (5th Cir. 1981) (history of school segregation); Walker v. Ford Motor Co., 684 F.2d 1355, 1359 (11th Cir. 1982) (racial slurs); Robinson v. Florida, 345 F.2d 133 (5th Cir. 1965) (state statute authorizing arrest of persons seeking service at "whites only" establishments); Baker v. City of St. Petersburg, 400 F.2d 294 (5th Cir. 1968) (discrimination in classifications of police officers); Dowdell v. City of Apopka, 698 F.2d 1181, 1184-86 (11th Cir. 1983) (municipal services); State of Florida ex rel. Hawkins v. Board of Control, 93 So.2d 354 (Fla. 1957) (admission to law school); Jones v. City of Sarasota, 89 So.2d 346 (Fla. 1956) (licensing).

lynching at Madison in 1882 went without a serious investigation. Another in Jefferson County in 1888 resulted in the arrest of five white men, but all of them were acquitted by all-white juries. Two especially repugnant lynchings in the mid-1890's led Governor William D. Bloxman to deplore the practice in his 1897 inaugural address, but he offered no remedy. The praise of white supremacy and persistent reminders of its alternatives from prominent men perpetuated a climate of tolerance for violence by whites against blacks.

Shofner, Fla. Hist. Q. at 288.

In light of this legacy, the allegations made by Mr. Hitchcock must be taken as substantial indicia of the continuing effects of a way of life that is now universally condemned but not totally eradicated. The manifest commitment of the Constitution to "eradicat[ing] the last vestiges of a society half slave and half free," Jones v. Alfred H. Mayer Co., 392 U.S. at 441 n.78, demands that these allegations be heard and be heard fairly.

#### Conclusion

For these reasons, Mr. Hitchcock respectfully requests that the Court issue its decision vacating the judgment and opinion of the Court of Appeals, and remanding this cause with instructions to issue the writ of habeas corpus unless the State of Florida resentences Mr. Hitchcock; or to conduct an evidentiary hearing with regard to the issues presented herein.

Respectfully Submitted,
RICHARD L. JORANDBY
Public Defender
CRAIG S. BARNARD\*
Chief Assistant Public Defender
RICHARD H. BURR III
Assistant Public Defender
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

# **APPENDIX**

#### APPENDIX A

# CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

#### **Constitution Of The United States**

#### AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

#### AMENDMENT VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

#### AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### Florida Statutes (1975)

- 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—
- (1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of

defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

- (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);
- (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life \*[imprisonment] or death.
- (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a major-

ity of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
- (b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with § 775.082.
- (4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed 30 days by the supreme court for good cause shown. Such review by the supreme court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.
- (5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:
- (a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.

- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
  - (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious, or cruel.
- (6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:
- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
  - (g) The age of the defendant at the time of the crime.

#### Florida Statutes (1979)

# 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

- (2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.
- (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
- (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
- (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

### APPENDIX E

# PRESENT STATUS OF DEATH SENTENCES IMPOSED IN FLORIDA PRIOR TO LOCKETT v. OHIO

### 1. Execution/Executive Clemency

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Adams, James	Mar 74	341 So2d 765 (1977)	aff'd	executed 5/10/84
Alford, Leo	Apr 76	307 So2d 733 (1975)	aff'd	executive clemency 6/19/79
Antone, Anthony	Apr 76	382 So2d 1205 (1980)	aff'd	executed 1/26/84
Dobbert, Ernest	Apr 74	328 So2d 433 (1976)	affd	executed 9/7/84
Dobbert, Ernest	Jun 78	375 So2d 1069 (1979)	aff'd	executed 9/7/84
Francois, Marvin	Apr 78	407 So2d 885 (1982)	aff'd	executed 5/29/85
Funchess, David	Jul 75	341 So2d 762 (1977)	aff'd	executed 4/22/86
Gibson, Richard	Jan 76	351 So2d 948 (1977)	aff'd	executive clemency 5/6/80
Goode, Arthur	Mar 77	365 So2d 381 (1979)	affd	executed 4/5/84
Hallman, Clifford	Oct 73	305 So2d 180 (1974)	aff'd	executive clemency 6/19/79
Henry, James	Jun 74	328 So2d 430 (1976)	aff'd	executed 9/20/84
Hoy, Darrel	Apr 76	353 So2d 826 (1978)	aff'd	executive clemency 6/12/80
Palmes, Timothy	Jun 77	397 So2d 648 (1981)	affd	executed 11/8/84
Raulerson, James	Aug 75	358 So2d 826 (1978)	affd	executed 1/30/85
Rutledge, Jesse	Dec 75	374 So2d 975 (1979)	aff'd	executive clemency 4/16/83

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Salvatore, Michael	Dec 75	366 So2d 745 (1979)	aff'd	executive clemency 3/17/81
Shriner, Carl	Apr 77	386 So2d 525 (1980)	aff'd	executed 6/20/84
Spenkelink, John	Dec 73	313 So2d 616 (1975)	aff'd	executed 5/25/79
Straight, Ronald	Aug 77	397 So2d 903 (1981)	affd	executed 5/20/86
Sullivan, Robert	Nov 73	303 So2d 632 (1974)	aff'd	executed 11/30/83
Thomas, Daniel	Apr 77	374 So2d 508 (1979)	affd	executed 4/15/86
Thomas, Daniel	May 77	403 So2d 371 (1981)	aff'd	executed 4/15/86
Washington, David	Dec 76	362 So2d 658 (1978)	aff'd	executed 7/13/84
Witt, Johnny	Feb 74	342 So2d 497	aff'd	executed 3/6/85

### 2. Resentenced Or Retried After Lockett

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Delap, David	Feb 76	350 So2d 462 (1977)	new trial	resentenced to death
Drake, Raymond	Jun 78	400 So2d 1217 (1981)	new trial	resentenced to death reversed 441 So2d 1079
Elledge, William	Mar 75	346 So2d 998 (1977)	resent w jur	resentenced to death
Ferguson, John	May 78	417 So2d 639 (1982)	resent w/o jur	resentenced to death
Jones, Leslie	May 75	362 So2d 1334 (1978)	new trial	resentenced to death
Lucas, Harold	Feb 77	376 So2d 1149 (1979)	resent w/o jur	resentenced to death vacated 417 So2d 250

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Magill, Paul	Apr 77	386 So2d 1188 (1980)	resent w/o jur	resentenced to death
Messer, Charles	Jan 75	330 So2d 137 (1976)	resent w jur	resentenced to death
Mikenas, Mark	Jul 76	367 So2d 606 (1979)	resent w/o jur	resentenced to death
Morgan, James	Dec 77	392 So2d 1315 (1981)	new trial	resentenced to death
Riley, Wardell	Apr 76	366 So2d 19 (1979)	resent w/o jur	resentenced to death
Rose, James	May 77	425 So2d 521 (1983)	resent w jur	resentenced to death
Spaziano, Joseph	Jul 76	393 So2d 1119 (1981)	resent w/o jur	resentenced to death pending cert. No.
Thompson, Willie	Jan 76	351 So2d 701 (1977)	new trial	resentenced to
Valle, Manuel	May 78	394 So2d 1004 (1981)		resentenced to death

### 3. Resentenced To Life Or Convicted Of Lesser Offense

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Anderson, Allen	Oct 77	420 So2d 574 (1982)	new trial	not retried
Brewer, Patrick	Jun 78	386 So2d 232 (1980)	new trial	no death
Bryant, Alonzo	Nov 77	412 So2d 347 (1980)	new trial	no death
Coler, Daniel	Apr 78	418 So2d 238 (1982)	new trial	life on retrial
Coxwell, Chester	Jan 77	361 So2d 148 (1978)	new trial	life on retrial
Fleming, Myron	Jul 76	374 So2d 954 (1979)	resent w/o jur	life on resentencing
Foster, Clyde	Dec 74	387 So2d 344 (1980)	new trial	no death
Franklin, George	Nov 77	403 So2d 975 (1981)	new trial	life on retrial

Defendant		Appeal* Citation	Appeal Result	Comments
Freeman, Eddie	Apr 78	377 So2d 1152 (1980)	new trial	no death
Gafford, Danny	1.00	387 So2d 333 (1980)	resent w/o jur	resentencing
Hall, Freddie	Jun 78	403 So2d 1319 (1981)	reduced conv	no death
Hall, Jesse	Apr 76	381 So2d 683 (1980)	new trial	no death
Kilpatrick, George	May 77	376 So2d 386 (1979)	new trial	life on retrial
Lamadline, Michael	Jul 73	303 So2d 17 (1974)	resent w jur	resentenced to life
Lane, Hayward	Jul 77	388 So2d 1022 (1980)	new trial	no death
Lewis, Enoch	May 76	377 So2d 640 (1980)	resent w/o jui	r no death
Lewis, Robert	Dec 76	398 So2d 432 (1981)	resent w/o ju	r resentenced to life
Maggard, John	Apr 77	399 So2d 973 (1981)	resent w/jur	resentenced to life
Malone, Charles	Apr 78,	390 So2d 338 (1980)	new trial	life on retrial
Manning, Derrick	Dec 76	378 So2d 274 (1980)	new trial	no death
Martin, Glen	Oct 75	360 So2d 396 (1978)	new trial	convicted of lesser
Miller, Jon	Oct 76	373 So2d 882 (1979)	resent w jur	resentenced to life
Mines, Winford	Jan 77	390 So2d 332 (1980)	resent w/o ju	ir resentenced to life
Moody, Eldred	Oct 77	418 So2d 989 (1982)	resent w/o ju	ir resentenced to life
Perri, Thomas	Jul 78	441 So2d 606 (1983)	resent w jur	resentenced to life
Perry, Donald	Nov 77		resent w/o ju	ur resentenced to life
Ross, Frank	Oct 77	384 So2d 1269 (1980)	resent w/o j	
Simpson, Willie	May 76		new trial	convicted of lesser

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Surace, Bruce	Jun 76	351 So2d 702 (1977)	new trial	life on retrial
Tibbs, Delbert	Mar 75	337 So2d 788 (1976)	new trial	not retried
Wheeler, Wayne	Apr 76	344 So2d 244 (1977)	new trial	no death

### 4. Life Sentence On Direct Appeal

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Barfield, John	Mar 78	402 So2d 377 (1981)	life	
Brown, Henry	Aug 75	367 So2d 616 (1979)	life	
Buckrem, Franz	May 75	355 So2d 111 (1978)	life	
Burch, Jackson	Ma: 74	343 So2d 831 (1977)	life	
Chambers, Glen	Jul 75	339 So2d 204 (1976)	life	
Halliwell, Thomas	May 74	323 So2d 557 (1975)	life	
Huckaby, Benjamin	Jun 75	343 So2d 29 (1977)	life	
Jacobs, Sonja	Aug 76	396 So2d 713 (1981)	life	
Jones, Jimmy	Sep 73	332 So2d 615 (1976)	life	
Kampff, John	Jun 76	371 So2d 1007 (1979)	life	
Lee, Rudolph	Jun 75	340 So2d 474 (1976)	life	
Malloy, Rodney	May 76	382 So2d 1190 (1979)	life	
McCaskill, James	Dec 73	344 So2d 1276 (1977)	life	
McKennon, Roy	Apr 78	403 So2d 389 (1981)	life	
Neary, Jack	Apr 77	384 So2d 881 (1980)	life	

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Odom, Eddie	Oct 76	403 So2d 936 (1981)	life	
Phippen, James	Jun 78	389 So2d 991 (1980)	life	
Provence, Michael	Nov 74	337 So2d 783 (1976)	life	
Purdy, Clarence	Feb 75	343 So2d 4 (1977)	life	
Shue, Williams	Feb 77	366 So2d 387 (1978)	life	
Slater, Darius	Apr 74	316 So2d 539 (1975)	life	
Swan, Lloyd	Mar 74	322 So2d 485 (1975)	life	
Taylor, Joseph	Jul 73	294 So2d 648 (1974)	life	
Tedder, Mack	Jul 74	322 So2d 908 (1975)	life	
Thompson, Larry	Jan 74	328 So2d 1 (1976)	life	
Vasil, George	Dec 74	374 So2d 465 (1979)	life	
Williams, Clifford	Oct 76	386 So2d 538 (1980)	life	
Williams, Otis	Dec 73	344 So2d 1276 (1977)	life	
5. Other				
Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Agan, James	Sep 74	none		resentenced to life before appeal
Alvord, Gary	Apr 74	322 So2d 533 (1975)	aff'd	incompetent
			40.1	110 1 1 0

Apr 75 343 So2d 1266 (1977)

Barclay, Elwood

aff'd

life ordered after state habeas, 444 So2d 956

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Brown, Joseph	Jul 74	381 So2d 690 (1980)	affd	vacated, 785 F.2d 1457
Carnes, Walter	Nov 74	none		suicide before decision
Darden, Willie	Jan 74	329 So2d 287 (1976)	aff'd	habeas denial aff'd 106 S.Ct. 2464
Dougan, Jacob	Apr 75	343 So2d 1266 (1977)	aff'd	resent ordered on state habeas, 448 So2d 1005
Douglas, Howard	Dec 73	328 So2d 18 (1976)	aff <sup>*</sup> d	death vacated 739 F.2d 531
Enmund, Earl	Sep 75	399 So2d 1362 (1981)	aff'd	life USSCt 458 US 782
Francis, Bobby	Jun 76	none		new trial ordered before appeal, resent to death
Gardner, Wilber	Jan 74	313 So2d 675 (1975)	aff'd	sentence vacated, 430 U.S. 349, resent life
Holmes, Monroe	Nov 75	374 So2d 944 (1979)	aff'd	died in prison
Jacobs, Eligaah	Feb 76	343 So2d 1266 (1981)	aff'd	vacated on state post- conviction
King, Amos	Jul 77	390 So2d 315 (1980)	aff'd	death vacated, 714 F.2d 1481
LeDuc, John	Jul 75	365 So2d 149 (1978)	aff'd	vacated in state post-conviction
Menendez, Antonio	Mar 76	368 So2d 1278 (1979)	resent w/o jur	•
Miller, John	Apr 74	332 So2d 65 (1976)	resent w/jur	resentenced to death, later reversed
Peek, Anthony	May 78	395 So2d 492 (1981)	affd	vacated in state post-conviction
Proffitt, Charles	Mar 74	315 So2d 461 (1975)	aff'd .	sent vacated 685 F.2d 127 resent w/o jur to death

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Sawyer, Anthony	Oct 73	313 So2d 680 (1975)	aff d	mitigated to life by trial court
Smith, Dennis	Mar 76	365 So2d 704 (1978)	affd	conviction vacated, 741 F.2d 1248
Vaught, Charles	Sep 77	410 So2d 147 (1982)	affd	life on state post-conviction
Walker, Ernest	Jun 76	none		suicide before decision

### 6. Pending-

### a. Federal Habeas Corpus

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Armstrong, Sampson	Sep 75	399 So2d 953 (1981)	aff'd	habeas granted N.D. Fla. No. 82-309-Civ-T-15
Clark, Ray <sup>†</sup>	Sep 77	379 So2d 97 (1980)	aff'd	11 CA No. 86-3022
Cooper, Vernon	Jul 74	336 So2d 1133 (1976)	affd	11 CA No. 85-3583
Demps, Bennie†	Apr 78	395 So2d 501 (1981)	aff'd	11 CA No. 85-3485
Elledge, William†	Aug 77	408 So2d 1021 (1982)	aff'd	11 CA No. 86-5120
Ford, Alvin	Jan 75	374 So2d 496 (1979)	affd	pending competency hearing see 106 S.Ct. 2595
Foster, Kenneth	Oct 75	369 So2d 928 (1979)	aff'd	11 CA No. 86-3539
Hall, Freddie <sup>†</sup>	Jun 78	420 So2d 1321 (1981)	aff'd	11 CA No. 86-3073
Hargrave, Lenson	Jul 75	366 So2d 1 (1979)	aff'd	11 CA No. 84-5102
Jackson, Carl	Sep 75		aff'd	N.D. Fla. MCA-84-2087-RV

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Jackson, Ronald	Dec 74	366 So2d 752 (1978)	affd	11CA No. 85-3057
Knight, Thomas	Apr 75	338 So2d 201 (1976)	affd	11CA No. 86-5610, sub nom Muhammad
Meeks, Douglas	Mar 75	339 So2d 186 (1976)	aff'd	M.D.Fla. No. TCA-80-746-MP
Meeks, Douglas	Jun 75	336 So2d 1142 (1976)	aff'd	M.D.Fla. No. TCA-80-746-MP
Meeks, Douglas†	Sep 77	364 So2d 461 (1978)	aff'd	M.D.Fla. No. TCA-80-746-MP
Messer, Charles	Jun 76	403 So2d 341 (1981)	affd	11CA No. 85-3124
Stone, Raymond	Oct 75	378 So2d 765 (1980)	affd	N.D. Fla.No. 86-792-Civ-J-14
Tafero, Jesse	May 76	403 So2d 355 (1981)	aff'd	11CA No. 84-5908
White, Beauford†	Apr 78	403 So2d 331 (1981)	aff'd	632 F. Supp. 1140
Ziegler, William†	Jul 76	402 So2d 365 (1981)	aff'd	11CA Nos. 86-3310, 86-3311; also pending state post-conviction

### b. Certiorari In Supreme Court Of The United States

Defendant	Sent Date	Appeal* Citation	Appeal Result	Comments
Aldridge, Levis	Jan 75	351 So2d 942 (1977)	aff'd	pending cert. No. 85-6956 after fed habeas denied
Harvard, William	Oct 74	375 So2d 833 (1978)	Gardner resent	pending cert. No. 86-5157 resent w/o jur 486 So2d 537 (Fla. 1986)
Hitchcock, James†	Feb 77	413 So2d 341 (1982)	aff'd	USSCt, No. 85-6756
Songer, Carl†	Aug 77	365 So2d 696 (1978)	aff'd	pending cert. No. 85-567 after sent vacated 769 F2d 1488

	c.	State	Post-Co	nviction							
Buford,	Rob	ert†	Mar 78	403 So2d 943 (1981)	aff'd						
Downs,	Em	est†	Jan 78	386 So2d 788 (1980)	affd	î	nai	nd	an	nu	S
McCrae	, Jan	nes	May 74	395 So2d 1145	aff'd						
Sireci,	Henr	y†	Nov 76	399 So2d 964 (1981)	affd						
		SUN	MMARY	: OVERALL	CATEGO	RIE	S				
Total	Ser	tences	s Impos	ed						9	9 9
				enced**							

Defendants Executed/Clemency .....

Defendants Retried/Resentenced after Lockett ....

Lesser Offense .....

Defendants Resentenced to Life on Appeal . . . . . .

Other Dispositions .....

pre-Cooper .....

post-Cooper .....

pre-Cooper .....

pre-Cooper ......post-Cooper .....

pre-Cooper ......post-Cooper .....

a. Federal habeas corpus

c. State Post-Conviction

b. Certiorari

Total

Defendants Resentenced to Life or Convicted of

149

31

- \*Citations to the direct appeal decisions in the Supreme Court of Florida are provided for reference purposes only; subsequent case histories are not cited.
- \*\*The difference between the total defendants sentenced and the total sentences imposed is caused by resentencing proceedings occurring prior to *Lockett* or multiple death sentences.
- †-Sentencing occurring subsequent to the decision in Cooper v. State, 336 So2d 1133 (Fla. 1976).

SOURCE: This survey was prepared from data collected by Professor Michael Radelet, Department of Sociology, University of Florida, supplemented by reported decisions, current statistics from NAACP Legal Defense Fund, Death Row U.S.A., and present case status information provided by the Office of Capital Collateral Representative, Tallahassee, Florida. The data is current to August 7, 1986.

#### APPENDIX C

# A SURVEY OF STATE COURT OPINIONS BETWEEN PROFFITT v. FLORIDA AND LOCKETT v. OHIO

#### FLORIDA, OHIO, ARIZONA

#### FLORIDA OPINIONS

#### Cases Where Only Non-Lockett Constitutional Claims Made:

Hargrave v. State, 366 So.2d 1 (June 1978)
Jones v. State, 362 So.2d 1334 (June 1978)
Raulerson v. State, 358 So.2d 826 (Mar. 1978)
Jackson v. State, 359 So.2d 1190 (Mar. 1978)
Spenkelink v. State, 350 So.2d 85 (Sept. 1977)
Gibson v. State, 351 So.2d 948 (July 1977)
Aldridge v. State, 351 So.2d 942 (June 1977)
Elledge v. State, 346 So.2d 998 (Apr. 1977)
McCaskill v. State, 344 So.2d 1276 (Apr. 1977)
Barclay v. State, 343 So.2d 1266 (Mar. 1977)
Chambers v. State, 339 So.2d 204 (Nov. 1976)
Meeks v. State, 339 So.2d 186 (Oct. 1976)

#### Cases With No Constitutional Claims:

Martin v. State, 360 So.2d 396 (June 1978)
Jacobs v. State, 357 So.2d 169 (Mar. 1978)
Adams v. State, 355 So.2d 1205 (Mar. 1978)
Buckrem v. State, 355 So.2d 1205 (Mar. 1978)
Hoy v. State, 353 So.2d 826 (Dec. 1977)
Alford v. State, 355 So.2d 108 (Nov. 1977)
Sullivan v. Askew, 348 So.2d 312 (June 1977)
Surace v. State, 351 So.2d 702 (June 1977)
Harvard v. State, 351 So.2d 833 (Apr. 1977)
Thompson v. State, 351 So.2d 701 (June 1977)
Burch v. State, 343 So.2d 831 (Feb. 1977)
Huckaby v. State, 343 So.2d 29 (Feb. 1977)
Purdy v. State, 343 So.2d 4 (Feb. 1977)
Witt v. State, 342 So.2d 497 (Feb. 1977)
Adams v. State, 341 So.2d 765 (Dec. 1976)

Funchess v. State, 341 So.2d 762 (Dec. 1976) Lee v. State, 340 So.2d 474 (Dec. 1976) Knight v. State, 338 So.2d 201 (Sept. 1976) Meeks v. State, 336 So.2d 1142 (July 1976) Tibbs v. State, 337 So.2d 788 (July 1976) Provence v. State, 337 So.2d 783 (July 1976)

#### Unclear

Proffitt v. State, 360 So.2d 771 (June 1978)

#### OHIO OPINIONS

#### Cases With Lockett-Type Claims:

State v. Nabozny, 375 N.E.2d 784 (May 1978) State v. Wiend, 364 N.E.2d 224 (June 1977) State v. Bayless, 357 N.E.2d 1035 (Nov. 1976)

# Cases With Only Non-Lockett Constitutional Claims: Supreme Court

State v. Curtis, 375 N.E.2d 52 (Apr. 1978) State v. Wade, 373 N.E.2d 1244 (Mar. 1978) State v. Adams, 374 N.E.2d 137 (Mar. 1978) State v. Barker, 372 N.E.2d 1324 (Feb. 1978) State v. Toth, 371 N.E.2d 831 (Dec. 1977) State v. Shelton, 364 N.E.2d 1152 (July 1977) State v. Downs, 364 N.E.2d 1140 (July 1977) State v. Williams, 364 N.E.2d 1364 (July 1977) State v. Osborne, 364 N.E.2d 216 (July 1977) State v. Jackson, 364 N.E.2d 236 (June 1977) State v. Perryman, 358 N.E.2d 1040 (Dec. 1976) State v. Edwards, 358 N.E.2d 1051 (Dec. 1976) State v. Osborne, 359 N.E.2d 78 (Dec. 1976) State v. Harris, 359 N.E.2d 67 (Dec. 1976) State v. Lockett, 358 N.E.2d 1062 (Dec. 1976) State v. Lane, 358 N.E.2d 1081 (Dec. 1976) State v. Royster, 358 N.E.2d 616 (Dec. 1976)

State v. Lytle, 358 N.E.2d 623 (Dec. 1976)

State v. Hall, 358 N.E.2d 590 (Dec. 1976)

State v. Black, 358 N.E.2d 551 (Dec. 1976)

State v. Bell, 358 N.E.2d 556 (Dec. 1976)

State v. Hancock, 358 N.E.2d 273 (Dec. 1976)

State v. Woods, 357 N.E.2d 1059 (Dec. 1976)

State v. Strodes, 357 N.E.2d 375 (Nov. 1976)

#### **Court Of Appeals**

State v. Johnson, 395 N.E.2d 368 (Nov. 1977) State v. Bridgeman, 366 N.E.2d 1378 (Apr. 1977)

#### Cases With No Constitutional Claim. (Supreme Court)

State v. House, 376 N.E.2d 588 (May 1978)

State v. Black, 376 N.E.2d 948 (May 1978)

State v. Cooper, 370 N.E.2d 725 (Dec. 1977)

State v. Miller, 361 N.E.2d 419 (Mar. 1977)

State v. Bates, 358 N.E.2d 584 (Dec. 1976)

State v. Roberts, 358 N.E.2d 530 (Dec. 1976)

#### ARIZONA OPINIONS

#### Cases With Lockett-Type Claims:

State v. Bishop, 576 P.2d 122 (Mar. 1978) State v. Raymond, 560 P.2d 41 (Dec. 1976)

#### Cases With Only Non-Lockett Constitutional Claims:

State v. Ceja, 565 P.2d 1274 (May 1977)

State v. Holsinger, 563 P.2d 888 (Apr. 1977)

State v. Blazak, 560 P.2d 54 (Jan. 1977)

State v. Jordan, 561 P.2d 1224 (Dec. 1976)

State v. Lee, 559 P.2d 657 (Dec. 1976)

State v. Watson, 559 P.2d 121 (Nov. 1976)

State v. Ceja, 546 P.2d 6 (Feb. 1976)

#### Cases With No Constitutional Claims:

State v. Arnet, 579 P.2d 542 (Apr. 1978)

State v. Treadway, 568 P.2d 1061 (July 1977)

State v. Doss, 568 P.2d 1054 (July 1977)

State v. Murphy, 555 P.2d 1110 (Oct. 1976)

No. 85-6756

IOSEPH F. SPANIOL JR.

CLERK

IN THE

COURT OF THE UNITED STATES OCTOBER TERM 1985

JAMES ERNEST HITCHCOCK,

Petitioner,

LOUIE L. WALANRIGHT, Secretary, Florida Department of Corrections,

Respondent.

\*\*\*\*\*\*\*\*\*\*\*\*\* On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit 

#### BRIEF FOR RESPONDENT

JIM SMITH ATTORNEY GENERAL

RICHARD PROSPECT ASSISTANT ATTORNEY GENERAL, BUREAU CHIEF

SEAN DALY\* ASSISTANT ATTORNEY GENERAL 125 N. Ridgewood Avenue Fourth Floor Daytona Beach, Florida, 32014 (904) 252-1067

Counsel for Respondent \*Attorney of Record

BEST AVAILABLE COPY

#### QUESTIONS PRESENTED

- 1. Whether the court of appeals erred in applying its case-by-case analysis to determine that upon the record presented the petitioner's claim of a constitutionally deficient capital sentencing proceeding due to his trial attorney's belief that the presentation of non-statutory mitigating circumstance evidence was precluded by Florida law, was without legal basis and insufficient to demonstrate that petitioner was denied an individualized sentencing hearing.
- 2. Whether the Florida death penalty statute approved in <u>Proffitt</u> against claims that it was arbitary and capricious can be challenged on those same grounds upon a limited statistical analysis proffered to demonstrate a race of victim based disparity systemwide in the imposition of death sentences where no allegation or proof of discriminatory intent was presented.

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SUPPORT SUCH A CLAIM.

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#### SUMMARY OF ARGUMENT

The court of appeals properly applied case-by-case analysis test its rejecting Hitchcock's claim that Florida's capital sentencing law as applied prior to this Court's decision in Lockett v. Ohio. precluded the presentation of mitigating evidence other than that relating to statutorily enumerated mitigating factors and by operation of law in fact deprived him of an individualized capital sentencing proceeding. As correctly determined by the district court in the summary dismissal affirmed by the court of appeals, the record evidence adduced demonstrated the presentation of nonstatutory mitigating evidence throughout the trial and sentencing proceedings sufficient to undermine Hitchcock's claim that his trial counsel believed himself limited in the presentation of such evidence. A wealth of testimony

irrelevant to statutorily enumerated factors was presented to the judge and jury and argued by defense counsel as a basis for sparing the petitioner's life. No limitation by objection or motion of the prosecutor or ruling by the trial judge in any way limited the presentation of non-statutory mitigating evidence at sentencing. The testimony and argument which was in fact presented related to the jury the gist of the non-statutory mitigating evidence which Hitchcock now claims might have been presented and would not have affected the outcome of his sentencing proceeding.

Hitchcock's claim that Florida's capital sentencing law is being discriminatorily applied in violation of the Eighth and Fourteenth Amendments based upon an invidious race of victim based societal prejudice was properly rejected by the district court without evidentiary

hearing and that rejection was correctly affirmed by the circuit court of appeals Court's based upon this specific validation of Florida's death penalty statute as a proper and adequate vehicle for controlling the potential arbitrary, capricious or discriminatory sentencing that caused the invalidation of Florida's prior capital sentencing law. Mere statistical data cannot serve in and of itself as a sufficient basis for Florida's invalidating presumptively correct capital sentencing scheme absent independent evidence of an intentional discriminatory purpose which mere statistical data cannot supply. Simple numerical tabulations of data which may or may not have been accurately compiled and interpreted and which cannot control for the multitude of variables necessarily involved in the investigation, prosecution, conviction and sentencing in

the capital penalty context cannot provide
a legally sufficient basis for
invalidating Florida's death penalty
statute and all convictions and sentences
thereunder (sixteen of which have already
been executed) which have been based, in
part, on this Court's prior assurance that
the law if applied as written would pass
constitutional muster.

#### STATEMENT OF THE CASE

On January 21, 1977, Hitchcock was found guilty of the first degree murder of Cynthia Ann Driggers. The evidence presented at trial showed that approximately two weeks prior to the murder, Hitchcock, unemployed, ill, and with no place to live, came to Winter Garden, Florida, to stay with his brother, Richard. Hitchcock knew that coming to Florida was in violation of his Arkansas parole. (TR 779)1

Cynthia Ann Driggers, thirteen years old, was Richard Hitchcock's step-

The following symbols will be used to refer to the record in the court below:

(TR ) refers to the transcript of petitioner's January 1977 state trial included in the appellate record; (ASR ) refers to the transcript of the advising sentencing hearing before the jury on February 4, 1977; (SR ) refers to the transcript of sentencing before the trial judge on February 11, 1977; (JA ) refers to the joint appendix herein.

daughter. On the night of the murder, James Hitchcock went out with some friends, drank some beer, and smoked some marijuana. In a statement given to the police, Hitchcock revealed that upon returning to his brother's house, he went into Cynthia's bedroom at about 2:30 a.m. (TR 691) He had sex with Cynthia, and afterwards she stated that she was hurt and was going to tell her mother. Hitchcock told her that she could not, and she began hollering. Hitchcock grabbed her by the neck, and in an effort to silence her, picked her up and carried her outside to the yard. He told her that she could not tell her mother, and she began to scream. He grabbed her by the throat and began choking her, and when he released his grip, she again began to scream and cry out. Even though he hit her twice, she continued to scream; so Hitchcock choked her and "just kept

chokin' and chokin'" and after she was still, he pushed her over in the bushes and went back in the house, took a shower, washed his shirt and went back into his bedroom and lay down. (TR 691-692) Medical evidence showed that Cynthia Ann Driggers was, before the incident, a virgin.

Hitchcock testified at trial and admitted going into Cynthia's room but stated that the sex was voluntary on her part. He stated that he was sitting on the bed putting his pants back on when his brother Richard came in, grabbed Cynthia, and pulled her out of the house. followed and tried to prevent Richard from choking his own step-daughter. (TR 765) According to James Hitchcock, he could not break his brother's grip and after a time, it was determined that Cynthia was dead. Again, according to James, he told his brother Richard to go into the house and

that he would take care of the matter and then took Cynthia's body and put it in the bushes. (TR 766)

defense During the case petitioner's trial counsel introduced the testimony of a number of individuals including Hitchcock's siblings and his mother relating to the petitioner's nonviolent character. (TR 732,734,737,739-740,741,747) In addition, despite the fact that the prosecutor's relevancy objections were in many cases sustained by the court, defense counsel persisted in questioning those who knew Hitchcock as to his family background including: the fact that the petitioner was one of seven children (TR 735,750); his young age at which he left home (TR 735,750); whether the petitioner's natural father was alive (TR 735-736,741,747,748); the petitioner's age when his natural father died (TR 737); the lack of violence previously exhibited by Hitchcock towards children (TR 742-743,745); as well as the fact that his "attitude" toward his mother and family were good and that he always "minded" his mother and did what he was told. (TR 750)

The petitioner's trial testimony likewise related numerous aspects of his family background for the jury's edification including: his poverty as a child; the fact that he left home at the early age of thirteen because he could not stand his step-father striking and verbally abusing his mother; that he had been "drifting" from place to place since then; that his natural father had died when the petitioner was only six and that his mother had had to work to support the family's many children. (TR Furthermore, Hitchcock 733-735) asserted that his confession was motivated by his desire to protect his

"crippled" brother Richard who had helped him and had been like a father to him and because he felt he had nothing else to live for and nowhere else to go. (TR 776-777)

After a verdict of guilty was returned the advisory sentencing phase of the proceeding was held. Defense counsel again elicited family background information on the petitioner, similar and in addition to that already submitted at trial, through testimony of one of the petitioner's brothers who noted, inter alia, that: the petitioner's father had died in 1963 after having been bedridden with cancer for eight months; petitioner's natural father and mother had worked as farm laborers in Arkansas in attempting to raise a family of seven children; and that the petitioner on various occasions when he was five to six years old (and

after his natural father's death) had "sucked gas" which had seemingly caused his mind to wander at times. (ASR 7-10)

In conjunction with this testimony and the other evidence as to Hitchcock's family background adduced during the trial defense counsel argued to the jury in the advisory sentencing proceeding that they should consider "anything you feel is relevant" in their determination and evaluate "the whole picture, the whole ball of wax" in deciding whether to impose the death penalty. (ASR 13,52) Defense counsel then specifically recounted the various aspects of Hitchcock's family background presented to them at trial and in the advisory sentencing proceeding in arquing that death was not the appropriate punishment. (ASR 13-16) Specifically defense counsel recounted the fact that Hitchcock was one of seven children belonging to a farm laborer mother and father whose natural father died in 1963 when the petitioner was only 6 or 7 years old. The large size petitioner's family and their of economic situation along with his stepfather's mistreatment of his mother forced the petitioner to leave home at the tender age of thirteen and make his own way in the world for the seven years between then and the trial. (ASR 14-The gas sucking incidents were 15) recounted as was the testimony that petitioner's mind would "wander" and that he had no previous history of violence. The fact that the petitioner was a "good child" who "minded" his mother was likewise interjected as was petitioner's alleged truthfulness before the jury (in pointing out his parole violation) and the fact that he had himself in despite ample turned

opportunity to flee. (ASR 15-17,25-26) In addition defense counsel asserted the potential for petitioner's rehabilitation as well as an assertion that the defense was a "crime of emotional passion, an situation" sufficient to distinguish it from more grievous murders. (ASR 24-25) The evidence and argument relating to Hitchcock's family background and other clearly non-statutory mitgating factors was presented to the jury without limitation by objection or prosecutor or trial judge and at the conclusion of the hearing the jury recommended that Hitchcock be sentenced to death. (ASR 63)

In a separate sentencing proceeding a week later the trial judge considered argument by defense counsel who urged the sentencing judge to take into consideration the testimony concerning

the defendant's background and specifically focused upon the turmoil in his family history. (SR 4-5) Defense counsel asserted that the petitioner was intelligent individual although an "emotionally immature at times" who would be capable of rehabilitation if given the time to mature. (SR 4-5) Furthermore, defense counsel asked the court to consider the possibility of doubt as to the sufficiency of the evidence to demonstrate murder in the first degree. (SR 3-4) However, the trial court in agreement with the jury's recommendation, sentenced Hitchcock to death finding that the capital felony committed while Hitchcock was was engaged in the commission of sexual battery upon Cynthia Ann Driggers; that the capital felony was committed for the one purpose of avoiding being arrested for the involuntary sexual battery; and that the capital felony was especially heinous, wicked or cruel. 2 In terms of mitigation, the trial court found that Hitchcock's age, twenty, Weighing the aggravating applicable. factors against the sole mitigating circumstance, the trial court agreed with the recommendation of the jury and found that the recommendation was amply supported by the evidence. Hitchcock appealed his judgment of guilt and sentence of death to the Florida Supreme Court and in his brief dated August 15,

<sup>&</sup>lt;sup>2</sup>The trial court also found that Hitchcock had been previously convicted of five burglaries and was on parole at the time he committed the capital felony. Since Hitchcock was not under a sentence of imprisonment at the time, the trial judge did not find the aggravating factor 921.141(5)(a), contained section in Florida Statutes to be applicable. However, as noted by the Florida Supreme Court upon direct review of the conviction and sentence, the fact of parole is, under Florida law, sufficient to satisfy this aggravating factor. See, Hitchcock v. State, 413 So.2d 741,747 n. 6 (Fla. 1982).

1979, containing some fourteen separate issues, contended as a point on appeal that the decision of the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), unconstitutionally limited consideration of mitigating evidence in violation of this court's decision in Lockett v. Ohio, 438 U.S. 586 (1978). On February 25, 1982, that court affirmed conviction and both the sentence, Hitchcock v. State, 413 So.2d 741 (Fla. 1982), finding on this particular issue, that Florida law allowed the presentation of all relevant mitigating circumstances and that the record failed to reveal that the trial judge in any way limited the defense's presentation. 413 So.2d at 748.

Hitchcock then petitioned this Court for a writ of certiorari raising three questions. None of these questions concerned the operation of Florida law in terms of presentation of mitigating

evidence. The petition was denied.

Hitchcock v. Florida, 459 U.S. 960 (1982).

On April 21, 1983, the Governor of Florida denied clemency and signed Hitchcock's death warrant. Hitchcock then promptly filed a motion to vacate his death sentence pursuant to Florida Rule of Criminal Procedure 3.850. As one of the grounds presented in that motion, Hitchcock argued that received he ineffective assistance of counsel due to the belief of counsel that he was restricted by Florida's statute to presenting evidence in mitigation relating only to enumerated mitigating factors. The motion was denied without evidentiary On appeal the denial was hearing. the Florida Supreme Court affirmed, finding on the mitigating evidence issue, that it was the same claim in a different form that was argued and considered on direct appeal. Hitchcock v. State, 432

So.2d 42,43 (Fla. 1983). In a concurring opinion, Justice McDonald observed that Hitchcock's lawyer presented and argued non-statutory mitigating evidence such that a claim that counsel was in doubt as to the applicability of such evidence was belied. <u>Id.</u>, at 44. (McDonald, concurring).

Hitchcock then sought federal habeas corpus relief in a petition raising some fifteen separate challenges to his conviction and/or sentence. After reviewing the challenges and the state trial record, the district court dismissed the petition without a hearing pursuant to Rule 4 of the Rules Governing Section 2254 in the United States District Courts.

An appeal was taken to the Eleventh Circuit Court of Appeals and that court affirmed the summary dismissal. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984). A suggestion for rehearing en banc

was filed and granted. After briefing and argument, the <u>en banc</u> court of the Eleventh Circuit affirmed the judgment of the district court. <u>Hitchcock v. Wainwright</u>, 770 F.2d 1514 (11th Cir. 1985) (en <u>banc</u>). Rehearing was denied. <u>Hitchcock v. Wainwright</u>, 777 F.2d 628 (11th Cir. 1985).

THE COURT OF APPEALS PROPERLY APPLIED ITS CASE-BY-CASE ANALYSIS IN REJECTING, AS INSUFFICIENT TO RECORD OVERCOME EVIDENCE, THE PETITIONER'S CLAIM THAT HIS TRIAL ATTORNEY WAS PRECLUDED BY OPERATION OF FLORIDA LAW FROM PRESENTING NON-STATUTORY MITIGATING CIRCUMSTANCE EVIDENCE SUCH THAT PETITIONER WAS DENIED AN INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION.

The petitioner's argument begins with a laborious analysis of the history of Florida's post-Furman death penalty statute - section 921.141, Florida Statutes - and the case law interpreting and applying it, in support of his contention that Florida law prior to the Florida Supreme Court's decision in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979) clearly indicated that evidence of non-statutory mitigating circumstances could not be introduced in capital case. Accordingly, Hitchcock contends that his counsel was precluded "by operation of

from submitting relevant law" nonstatutory mitigating evidence as to his family background, character, and potential for rehabilitation, and doubt of quilt for the first degree murder offense for which he had just been convicted, such that he was deprived of the individualized sentencing determination required in capital cases. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. Skipper v. South 104 (1982);Carolina, U.S. , 106 S.Ct. 1669 (1986).

Petitioner's chief contention is that the decision of the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), limited evidence of mitigation to the statutorily enumerated circumstances and because of the belief of his attorney to that effect, relevant non-statutory evidence in mitigation was not presented at his trial. Thus, he reasons, his

sentence was imposed in violation of the Eighth and Fourteenth Amendments.

Of the many judicial considerations of the decision in Cooper, petitioner understandably relies upon those most favorable to him to support his fundamental premise that Cooper flatly limited the scope of mitigating evidence which could be considered in a capital proceeding. While respondent acknowledges the existence of these pronouncements, he nevertheless questions the ease with which commentators legal and judges extended an interpretation of Cooper past that found in the original panel opinion, i.e., as containing language"... which some contend should be interpreted as limiting the introduction of mitigating circumstances to those enumerated in the statutes." Hitchcock v. Wainwright, 745 F.2d 1332,1335 (11th Cir. 1984). That there is language which can be so

interpreted is conceded; however, that the language is the holding of the <u>Cooper</u> court is seriously disputed.

#### STATUS OF FLORIDA LAW

An examination of the decision in Cooper v. State, supra, reveals a mere four paragraphs of judicial expression. Pertinent language is directed only to a claim raising alleged error surrounding the trial court's refusal, on grounds of relevance, of certain testimony proffered during the penalty phase of Cooper's trial relating to his employment history, the victim's reputation for violence, and Cooper's attempt to avoid his coperpetrator on prior occasions. The defense sought to have this testimony admitted to show that the co-perpetrator (killed during the incident) had probably fired the fatal shots, and that Cooper was not beyond rehabilitation. Importantly, while the trial court rejected these

proffers of evidence, other questionably probative or relevant evidence regarding general character and reputation for truthfulness and non-violence was admitted into evidence. 336 So.2d at 1139.

In holding that the refusal to admit the proffered evidence was not error, the Florida Supreme Court predicated its judgment on its previous decision in State v. Dixon, 283 So.2d 1 (Fla. 1983), stating that only evidence bearing relevance to the issues was to be admitted during the phases of sentencing proceeding. Although the factors in mitigation listed in the statute were mentioned, the holding was nonetheless bottomed only on a notion of relevance. This is precisely what was confirmed in Songer v. State, 365 So.2d 696 (Fla. 1978), and, more importantly, specifically reiterated in Cooper v. State, supra.

Songer contains reference to numerous

decisions where non-enumerated mitigating circumstances were presented to the sentencer and, as pointed out by the district court below, some of those published decisions were prior to Hitchcock's trial. (JA 83-84) The Florida Supreme Court relied upon the decisions as representing its approval of the consideration of non-statutory mitigating factors. Songer v. State, supra, 365 So.2d at 700.

In Meeks v. State, 336 So.2d 1142 (Fla. 1976), the trial court considered the "dull-normal intelligence" of the defendant and found it a mitgating factor. In Buckrem v. State, 355 So.2d 111 (Fla. 1978), and Chambers v. State, 339 So.2d 204 (Fla. 1976), the court recognized voluntary intoxication and drug use. In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the fact that the defendant was under an emotional strain

over mistreatment of his girlfriend by the deceased and his status as a Vietnam veteran were mentioned. In McCaskill v. State, 344 So.2d 1276 (Fla. 1977), the fact that the defendant was not the triggerman was utilized as a basis to the life reduce sentence to imprisonment. In Messer v. State, 330 1976), So.2d 137 (Fla. the specifically held that the punishment received by a co-defendant in a separate trial was improperly excluded from the jury because it was relevant, citing to its earlier decision in Slater v. State, 316 So.2d 539 (Fla. 1975). Obviously, punishment received by a co-defendant in a separate trial is not a statutorily enumerated circumstance; yet, it was found admissible because of relevancy to the ultimate issue.

In that vein the legislative history of section 921.141, Florida Statutes

(1972) is of no consequence. What is of sole importance is the law as it was passed in 1972, as interpreted by the Florida Supreme Court. It is that court and only that court which can interpret Florida's capital sentencing statute and that interpretation, i.e., that neither the statute nor any decision of the Florida Court limited Supreme consideration of mitigating circumstances to those found in the statute, is conclusive and binding on all courts. Wainwright v. Stone, 414 U.S. 21 (1973). As a consequence, when the Florida Supreme Court in Cooper v. State, supra, stated that the decision in Lockett v. Ohio, supra, did not change the law of Florida that statement was at once binding and entirely accurate.

Relevance is the operative word in the presentation of mitigating evidence, whether statutory or otherwise. This was recognized in Lockett. There the Court was concerned with a record in a murder trial which, as the Court seemed to emphasize, contained no evidence of guilt, and a conviction would not have been obtained but for the operation of an aiding and abetting statute. The actual killer (triggerman) pleaded guilty and escaped the penalty of death in return for an agreement to testify against Lockett, her brother, and another perpetrator. The sole participation of Lockett in the offense was the driving of the getaway car. The prosecution offered a plea to a considerably lesser included offense and a substantially reduced sentence three separate times.

Against this backdrop of evidence, the Court centered upon the particulars of Ohio's capital sentencing statute. Under that law, in order to avoid a mandatory death sentence upon the proving of at

least one of seven specified aggravating circumstances, a capital defendant was limited to showing by a preponderance of the evidence: (1) the victim induced or facilitated the offense; (2) it was unlikely that the offense would have been committed but for the fact that the defendant was under duress, coercion, or strong provocation; or (3) the offense was primarily the product of the offender's psychosis or mental deficiency.

Based on the above facts and law, the holding of this Court was that the Eighth and Fourteenth Amendments required that the <u>sentencer</u> not be precluded from considering as a mitigating factor any aspect of the defendant's character and record or any evidence concerning the circumstances of the offense that the defendant proffered as a basis for a sentence less than death, <u>provided that</u> the evidence is relevant. As a specific

refinement of this general notion, the Lockett court stated:

The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments.

To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.

438 U.S. at 608. Put another way, the Ohio statute was simply too restrictive in terms of relevance.

expansive in its list of relevant mitigating factors but also provides for the receipt of all relevant evidence, the Florida Supreme Court was correct in concluding that Lockett did not affect the operation of the state's capital sentencing scheme. Florida's law was specifically mentioned as an obvious example of a non-limiting capital statute. Id. 438 U.S. at 606, n. 15. The source of this notion is, of course,

Proffitt v. Florida, 428 U.S. 242 (1976). Hitchcock easily ignores Proffitt by focusing on the six-day period elapsing between Proffitt and Cooper, thus adopting the view of Mr. Justice BRENNAN in the dissent from the denial of a petition for writ of certiorari in Songer v. Wainwright, \_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 817 (1985). As we understand the thrust of the contention, since Proffitt so closely preceded Cooper, Cooper was decided without knowledge of Proffitt, and thus the Florida Supreme Court unwittingly reached an interpretation of the statute contrary to that of this Court. The implicit extension of this position is that the Florida Supreme Court, either possible through embarrassment stubbornness, refused to mend its error and did not do so until and because Lockett was decided. In other words, Songer was the Florida Supreme Court's

effort to save Florida's statute in response to Lockett.

This viewpoint is both incorrect and unfair insofar as it suggests or assumes improper motive on behalf of the Florida Supreme Court. More importantly, it overlooks the fact that the decision in Cooper was on rehearing from July 8, 1976, until September 30, 1976, an ample period within which the Florida Supreme Court could have become familiar with the "...details in Proffitt's footnotes..." 105 S.Ct. 821, n.9. That the Florida Supreme Court "did nothing" between Cooper and Songer is due to no other obvious reason than the fact that Songer was the person to raise the direct first constitutional challenge as a result of the decision in Lockett.

While the possibility of confusion in the interpretation of Florida law <u>vis-a-vis</u> non-statutory mitigating circumstances

at the time in question has been recognized, the propriety of postconviction collateral review and relief upon a claim of limitation in the presentation or consideration of nonstatutory mitigating evidence has been adequately addressed by the case-by-case analysis theory applied by the court of appeals and the Florida Supreme Court which serves to balance the interest of the petitioner in presentation and resolution of his Lockett-based claim with the state's interest in finality of decisions and timely execution of sentence without undue interference through the collateral review process. Hitchcock v. Wainwright, 770 F.2d 1514 (1985) (en banc); Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc); Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985); State v. Zeigler, 488 So.2d 820 (Fla. 1986); Harvard v. State, 486 So.2d 537

(Fla. 1986); Hitchcock v. State, 432 So.2d (Fla. 1983). This case-by-case analysis provides a reasonable and workable method of review of the specific Lockett-based mitigating circumstance issue through evaluation of the allegations and demonstrations of the petitioner, the status of Florida's law at the date of sentencing, the record of the trial and sentencing, as well as posttrial affidavits or testimony of trial counsel or other witnesses and the proffers of non-statutory mitigating evidence claimed to have been available at the time of sentencing. Hitchcock v. Wainwright, supra, 770 F.2d at 1517. Furthermore, respondent submits that the court of appeals properly applied its case-by-case analysis under the particular circumstances of this case in affirming the decision of the district court (and the state courts) that petitioner's claim

that he was limited in the presentation of non-statutory mitigating evidence was clearly undermined by the trial record.

# THE RECORD REFUTES THE ALLEGATION OF RESTRICTION OF MITIGATING EVIDENCE IN THIS CASE

As the court of appeals observed, a number of Florida capital prisoners have raised the concept of restriction in mitigation in varying contexts. 770 F.2d at 1517. The court of appeals reaffirmed, en banc, that it would continue to consider such claims on a case-by-case basis, evaluating the impact of Florida law on each individual capital sentencing hearing. The Eleventh Circuit court announced:

... that an analysis should be made in each case presented to evaluate a petitioner's claim on the particular facts of the case. A court should consider the status of Florida's law on the date of sentencing, the record of the trial and sentencing, the jury

instructions requested and given, post-trial affidavits or testimony of trial counsel and other witnesses. and proffers nonstatutory mitigating evidence claimed to have been available at the time of sentencing. In some cases, full and fair consideration of the claim will necessitate an evidentiary hearing. Although an evidentiary hearing on the issue is preferable, in some cases, such as the one before us, the record will be sufficient to support a decision in the absence of an evidentiary hearing.

### Id. (JA 123).

Applying the above-quoted analysis, the court of appeals determined, as did the Florida Supreme Court and the federal district court, that the record of Hitchcock's trial belied the argument that the attorney for Hitchcock believed himself to be limited. The court went on to note examples where the lawyer raised matters and intended them to be circumstances in mitigation which were not listed in the statute.

The court of appeals evaluated the affidavit of trial counsel. Considering

it to be "carefully written", the court failed to find sufficient evidence of restrictive belief. The affidavit states only that counsel had reviewed the trial transcript in Hitchcock's case and was of the then present opinion that that the perception his was mitigating consideration of circumstances was limited to the factors Counsel enumerated in the statute. believed that his review of the transcript indicated that he was acting in accord with such a perception. While he believed that the statute limited the consideration, he did not recall when his perception changed. In fact, the import of the affidavit was slightly misperceived by the court of appeals. Contrary to the court's understanding, counsel did not swear that he did not mitigating investigate relevant Rather, he swore only circumstances.

that he was aware of the then current status of the case in the state court and that in that court, a claim had been made that available evidence of relevant non-statutory mitigating circumstances was not investigated or presented. Nowhere in the affidavit did counsel incorporate, ratify or otherwise adopt that allegation; he was not involved in the state court action which consisted of a motion to vacate filed subsequent to the signing of the death warrant. (JA 44-45)

Interestingly, the decision in <a href="Cooper v. State">Cooper v. State</a>, supra, is not even mentioned. Also, any stated belief of restriction is not alleged in the affidavits; the best counsel could provide was his stated perception of such a belief. However, that perception is rendered worthless by the direct statement that counsel nad no

independent recollection of whether he believed himself limited.<sup>3</sup>

If as petitioner apparently alleges, no non-statutory mitigating evidence was produced, what difference can it make whether that failure was due to counsel believing he was limited or counsel's ineffectiveness? If no

<sup>3</sup>Hitchcock attempted belatedly to submit a second affidavit of trial counsel attached to his petition for rehearing en banc in an effort to persuade the court of appeals, in light of its holding, that the attorney believed himself limited. Even that affidavit did nothing to require the need for an evidentiary hearing. Though longer than the first, it was not significantly or materially different. The affidavit was still predicated on counsel's eight-year-old perception and interestingly, the final paragraph is still replete with tentative language: "may have been significantly different"; "may have developed"; may have included Most importantly, counsel evidence." still did not swear that he did not investigate all possible areas of Also, he did not mention mitigation. Cooper v. State, supra, and he did not identify any source of perceived limitation. The second affidavit was just as "carefully written" as the previous one.

evidence was produced for either reason then there is clearly a basis for the claim. If, on the other hand, nonstatutory mitigating evidence produced, then there is no basis for such a claim. The obvious source of answering this question, as noted by the court of appeals, is in the record itself and it is the record that undermines petitioner's claim that his counsel believed himself limited in presentation of non-statutory mitigating evidence. Respondent, like the court of appeals below, rejects the claim that counsel believed he was limited in the presentation of mitigating evidence, and the record supports that rejection. Hitchcock v. Wainwright, supra, 770 F.2d at 1517-1518. (JA 124-126)

Indeed, practically the first thing that Hitchcock's lawyer told the jury in his summation during the advisory

sentencing proceeding was that they should consider anything they thought relevant and in his closing to that same jury, defense counsel exhorted them to whole and evaluate "the consider picture, the whole ball of wax" in deciding whether to impose the death penalty. (ASR 13,52) Before the jury defense counsel recounted the various aspects of Hitchcock's family background presented to them at trial4 as well as similar testimony presented through Hitchcock's brother at the advisory sentencing proceeding in arguing that not the appropriate death was punishment. (ASR 13-16) These clearly mitigating non-statutory factors included reference to Hitchcock's

<sup>&</sup>lt;sup>4</sup>Cf. Harvard v. State, 486 So.2d 537, 539 (Fla. 1986) - nonstatutory mitigating factors may arise from evidence presented in trial phase.

impoverished family background; the fact that his natural father had died after having been bedridden with cancer for eight months while the petitioner was very young; that petitioner's natural father and mother had worked as farm laborers in attempting to raise a family of seven children; that the petitioner had "sucked gas" when he was five or six years old and that this had caused his to "wander" at times; that mind Hitchcock had left home at the early age of thirteen because he could not stand his stepfather striking and verbally abusing his mother; that he had been "drifting" from place to place ever since; that his "attitude" towards his mother and family were good and that he always "minded" his mother and did what he was told; that he had been truthful before the jury in pointing out his parole violation; and that he had turned

himself in despite ample opportunity to flee. (ASR 13-17) In addition, defense counsel asserted the potential for petitioner's rehabilitation as well as an assertion that the defense was a "crime of passion, in an emotional situation" sufficient to distinguish it from more grievous murders. (ASR 24-The evidence and argument relating 25) to Hitchcock's family background and these clearly non-statutory mitigating factors were presented to the jury without objection or limitation by the prosecutor or trial judge in an obvious effort to secure a recommendation of life imprisonment. Similar argument with no relationship to statutorily enumerated mitigating circumstances was presented at the sentencing hearing itself where defense counsel urged the sentencing take into judge to consideration the testimony concerning

the defendant's background and specifically focused upon the turmoil in his family history. (SR 4-5) Defense counsel urged that the petitioner, while intelligent individual. an "emotionally immature at times" and would be capable of rehabilitation if given the time to mature; furthermore defense counsel asked the court to consider the possibility of doubt as to the sufficiency of the evidence to demonstrate murder in the first degree. (SR 3-5)

This is the record which Hitchcock ignores when making his claim that he was denied a constitutionally improper individualized sentencing hearing because of a restricted belief of counsel. Indeed, to suggest that defense counsel would feel limited at the sentencing phase in presenting any potential mitigating evidence with

reference to non-statutory circumstances is to ignore the dogged determination exhibited by that same counsel at the despite repeated trial phase prosecutorial relevency objections and evidence of presentation Hitchcock's family background (e.g., the young age at which petitioner left home; whether petitioner's natural father was alive; the petitioner's age when his natural father died; the lack of violence previously exhibited towards children; the fact that petitioner was one of seven children; as well as the fact that his "attitude" towards his mother and family were good and that he always "minded" her and did what he was (TR 732-750) To suggest that told). this same counsel felt himself limited in the presentation of non-statutory mitigating circumstance evidence which was otherwise available to him and could

be utilized in argument against the imposition of the death penalty but for this belief is incredible especially in light of the total lack of any objection or limitation evinced by the prosecutor judge at the advisory trial sentencing proceeding as well as the fact that such evidence was submitted and argued to both the jury and judge by counsel. The Florida Supreme Court, the federal district court and the court of appeals all properly concluded that the claim lacked factual support respondent urges this court to leave undisturbed that determination inasmuch as it is based on a proper reasonable analysis based upon the circumstances presented.

Certainly, the petitioner must concede that non-statutory mitigating evidence was presented and argued by counsel. Accordingly, Hitchcock's

argument must necessarily fail for the question is not, and never has been, how thoroughly, completely or satisfactorily evidence in mitigation was presented on his behalf. This court should not be confused with what petitioner would like to have been presented and whether non-statutory mitigating evidence was presented at all. As long as one single bit of non-statutory evidence was even attempted to have been introduced, the basis for his claim totally evaporates.

The respondent cannot emphasize enough that the record before this Court, as concluded by the court of appeals, is the authoritative source serving to rebut all the petitioner's arguments; that it contains clear offerings of non-statutory mitigating evidence adequately contradicts the claim of limitation that he presents, inter alia, through his vague affidavit

II

The record renders the principles of Blackledge v. Allison, 431 U.S. 63 (1977) inapplicable. The record does represent an insurmountable barrier to this attack; it is more than adequate to conclusively show that petitioner is entitled to no relief. Indeed, it definitely provides the conclusion that the claim, when measured against it, is "patently frivolous.".

PROPERLY THE COURT OF APPEALS DISTRICT COURT'S UPHELD THE SUMMARY DISMISSAL OF PETITIONER'S CLAIM THAT FLORIDA'S DEATH PENALTY ARBITRARILY BEING CAPRICIOUSLY APPLIED BECAUSE OF VICTIM BASED RACE OF THE DISCRIMINATION ON SYSTEMWIDE STATISTICAL EVIDENCE LEGALLY TO SUPPORT SUCH A INSUFFICIENT CLAIM.

The petitioner, a white male who raped and brutally murdered his brother's white thirteen-year-old virgin step-daughter, that statistical evidence argues district court profferred to the demonstrated a statistically "significant" disparity in the ultimate imposition of the death penalty based upon the race of the victim of the offense. As noted by the petitioner, similar legal questions as to the propriety and disposition of Eighth and Fourteenth Amendment challenges to the application of otherwise facially valid death penalty statutes are also directly

presented in McCleskey v. Kemp, (No. 84-6811) pending before this Court. However, respondent submits that the instant case presents a more limited question as to the propriety of the district court's summary dismissal of his statistics-based race of victim discrimination claim as legally insufficient to demonstrate a basis upon which relief could be granted. petitioner's claim that the statistical data submitted in conjunction with his assertion that the Florida death penalty statute was arbitrarily and capriciously applied was sufficient to require an evidentiary hearing and to ultimately prevail in his constitutional challenge to the statute as applied is without legal basis.

The district court determined that under Rule 4 of the Rules Governing Section 2254 Cases in the United States

District Court, the petitioner's claim of arbitrary application of the Florida death penalty statute was without arguable merit Spinkellink v. in determined as Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979) (JA 87-88). The district court judge further noted that any statutory scheme devised by body cannot insure legislative completely uniform results but that given previous determinations, Florida's death penalty law contains adequate safeguards against capricious imposition of the death penalty and that given adherence to that statutory procedure, disparate sentencing results do not present a problem of constitutional implications absent allegation and showing of "intentional discrimination" not made by Hitchcock. (JA 88).

The district court's summary denial

of Hitchcock's claim comports with virtually every other ruling on the subject by Florida and federal courts. As correctly noted by the petitioner, Florida's have consistently courts rejected similar bare statistical compilations, and specifically the particular studies presented in support of his race of discrimination claim in this case, as insufficient to state even a preliminary basis to sustain a claim for relief. Henry v. State, 377 So.2d 692 (Fla. 1979); Adams v. State, 380 So.2d 423, 425 (Fla. 1980); Meeks v. State, 382 So.2d 673, 676 (Fla. 1980); Thomas v. State, 421 So.2d 160, 162-63 (Fla. 1982); Riley v. State, 433 So.2d 976, 979 (Fla. 1983). The Florida Supreme Court followed that precedent in rejecting the petitioner's claim that an evidentiary hearing should have been

held on his motion for post-conviction relief at the state trial court level limited statistical data upon the presented. 5 The court noted that it had peviously determined the same data insufficient to justify a hearing citing to Thomas, supra, at 163, where the same figures and methodology presented here were rejected under the test announced "hypothetical"; in Spinkellink as supported"; and "inadequately

Respondent notes that the Gross and Mauro study upon which the petitioner's argument principally focuses was never presented to the state trial court judge in Hitchcock's motion for post-conviction relief and stay of execution or to the Florida Supreme Court in its review thereof. However, as properly determined by the federal courts, the statistical data of the Gross and Mauro study was no more compelling than the other data presented in terms of its constitutional implications and the same data has, as been previously rejected as insufficient by Florida courts to justify relief.

insufficient to explain away "possible innocent explanations for the disparity." <u>Hitchcock v. State</u>, 432 So.2d 42, 43-44 (Fla. 1983).

The Spinkellink decision relied upon by the Florida courts and the federal district court below summarily deny the petitioner's claim, rejected the same argument raised by Hitchcock, i.e., that statistical evidence submitted was sufficient to show a disparity in the application of capital sentencing based upon the race of the victim. The court opined that under its review of this Court's decisions establishing the boundaries for a properly drawn non-arbitrary death penalty statute, a state could rest assured that its death penalty law would not be later invalidated and otherwise proper death sentences vacated upon

arbitrary or racially of claims application discriminatory absent allegation and proof of some specific act or acts evincing intentional or purposeful discrimination against the petitioner, and that mere statistical alleged racially an evidence of disparate impact without further proof purposeful intentional or of discrimination was insufficient to state a claim for relief under either the Eighth or Fourteenth Amendments. 578 F.2d at 613-16; Smith v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), modified, 671 F.2d 858 (5th Cir. Unit B), cert. denied, 459 U.S. 882 (1982). The Spinkellink court further noted that racially assuming even disproportionate impact based upon race the statistical data, of victim admission (also contained within the studies relied upon by Hitchcock) 6 that all non-racial factors cannot be

<sup>6</sup>The study evidence submitted to the state court (i.e. the testimony of Bowers and Pierce as to their statistical findings for the Henry case and the Foley study) clearly did not control for the numerous variables inherent in potential capital sentencing Obviously, differences in the collection of evidence, production of witnesses and ease of prosecution, as well as the experience and effectiveness of counsel, the nature of the evidence submitted visa-vis the various statutory and mitigating circumstances, as well as the universe of non-statutory and mitigating factors that inherent in an individualized sentencing determination make impossible to isolate race of victim prejudice as the cause for the alleged disparity. Indeed, the Gross and Mauro study now principally argued by Hitchcock concedes omitted that data unconsidered variables which are "endemic" and "inevitable" in mere statistical compilation studies could well explain the perceived race of victim disparity although they consider the possibility of substantial change in the figures "remote". Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27, 45-49, 105-110 (Nov. 1984).

controlled for or all potential non-race related explanations for their disparity rejected, undermined their utility.

The Spinkellink rationale has been repeatedly invoked by the Eleventh Circuit in addressing various claims of discriminatory racial impact in the Florida capital sentencing context. Upon that decisional cornerstone the repeatedly court of appeals has rejected, as it did in this case, the particular assertion that the surveys statistical presented challenge the application of Florida's death penalty law were sufficient to state a cause for relief or adequate to evidentiary hearing. justify an Funchess v. Wainwright, 788 F.2d 1443, 1446 (11th Cir. 1986), cert. denied and stay of execution denied, 106 S.Ct. 1668 (1986); Thomas v. Wainwright, 767 F.2d

738, 747-748 (11th Cir. 1935), cert. denied 106 S.Ct. 1242 (1986), stay of execution denied, 106 S.Ct. 1623 (1986); Henry v. Wainwright, 743 F.2d 761, 762 (11th Cir. 1984), stay of execution denied, 105 S.Ct. 54 (1984); Washington v. Wainwright, 737 F.2d 922, 923 (11th Cir. 1984), stay of execution denied, 105 S.Ct. 16 (1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983), stay of execution denied, 464 U.S. 109 (1983); Adams v. Wainwright, 709 F.2d 1443, 1449 (11th Cir. 1983), cert. denied, 464 U.S. 1063 (1984);compare; Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985).

In the McCleskey case also before this Court, the court of appeals again voiced its conclusion that the statistical studies at issue in attacking Florida's death penalty statute are legally

insufficient to merit relief or an evidentiary rehearing and noted that that determination is "supported and possibly even compelled" by this Court's decisions in the stay of execution context in Sullivan v. Wainwright, 464 U.S. 109 (1983) (stay of execution denied); Wainwright v. Adams, 466 U.S. 964 (1984) (stay of execution vacated); and Wainwright v. Ford, 467 U.S. 1220 (1984) (state's application to vacate stay of execution denied on other grounds). The Eleventh Circuit noted that a plurality in Ford through Mr. Justice POWELL, found that the same statistical evidence at issue in this case had been deemed insufficient "to raise a substantial ground upon which relief might be granted" in Sullivan and Adams. 104 S.Ct. at 3499. Similarly, in Stephens v. Kemp, 464 U.S. 1027 (1984), Mr. Justice POWELL

writing for four dissenters from a stay of execution based upon the Baldus study which forms the basis for the McCleskey case, again noted the facial insufficiency of statistical studies like those rejected in Sullivan to demonstrate "intentional" discrimination:

If the Baldus study is similar to the several studies filed with us in Sullivan v. Wainwright, 464 U.S. 109, 104 S.Ct. 450, 78 L.Ed.2d 210 (1983), the statistics in studies of this kind, many of which date as far back as 1948. are merely general statistical surveys that are hardly particularized with respect to any alleged "intentional" racial discrimination. Surely, contention can be made that the entire Georgia judicial system, at levels, all operates discriminate in all Arguments to this effect may have been directed to the type of statutes addressed in Furman v. Georgia, 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d. 346] (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in Gregg. Id. at 1030, n. 2.

The lack of constitutional impropriety

in Florida's the despite statute allegations of race of victim disparity is thus evinced by this Court's refusal to intervene on that basis in Florida cases Although to stay scheduled executions. Hitchcock predictably attempts to downplay the court of appeals' "speculation" as to the significance of these decisions, it is beyond comprehension to assume that given the qualitative difference and need for special care in judicial review constantly noted and applied by this Court in the irreversible context of death penalty cases, that executions would be allowed to take place if the claim raised was of constitutional merit. This Court, as correctly noted by the court of appeals apparently accepted below, has conclusion of the Florida Supreme Court the Eleventh Circuit the that statistical data at issue does not sufficiently state a claim for relief as made clear by this Court in Sullivan:

Applicant apparently first raised the issue of discriminatory application of the statute in a supplement to his most recent state habeas corpus petition, which was filed on November 15, 1983. Counsel for applicant, who is white, present voluminous statistics that they say support of discriminatory claim application of the sentence. Although some of the statistics are relatively new, many of the studies were conducted years ago and were available to applicant long before he filed his most recent state and federal habeas petitions. The Florida Supreme Court and both the federal District Court and the Eleventh Circuit have considered this data and determined in written opinions that it is insufficient to show that the Florida system unconstitutionally discriminatory. On the basis of the record before this Court, we find there is no basis for disagreeing in this case with their decisions.

104 S.Ct. at 451 (1983).

The rationale in <u>Spinkellink</u> and subsequent decisions like <u>Sullivan</u>, <u>Adams</u>,

and Ford sent a clear and proper message that in validating Florida's death penalty statute in Proffitt v. Florida, 428 U.S. 242 (1976), this Court determined that the potential for arbitrary and capricious application of the capital sentencing presumptively procedure had been removed. Therefore mere statistical data which did not and could not control for variables in of the myriad all individualized sentencing determinations could properly be rejected on Eighth and Fourteenth Amendment grounds absent an allegation and proof of intentional and purposeful discrimination which cannot be shown under applicable equal protection standards through the use of simple statistical information which does no more than allegedly identify disparate impact without proof of discriminatory intent or motivation. Village of Arlington Heights

v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-66 (1977); Washington v. Davis, 426 U.S. 229, 238-42 (1976).7 Since the mere statistical data like which forms that the basis Hitchcock's discrimination claim is sufficient only to show a possible disparate impact in sentencing based upon race of victim, but does not and cannot control for the countless variables inherent in the complicated capital sentencing procedures, such studies can never on their own be sufficient to prove discriminatory

intent or demonstrate that said intent is the only reasonable inference to be drawn under the circumstances. 8 See, Arlington Heights, supra at 264-66.

Respondent contends that given the

<sup>7</sup>Hitchcock improperly urges the standard of review for Title VII cases noted in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). As this Court noted in Washington v. Davis, supra, that more rigorous standard for evaluating racial impact is not applicable outside the Title VII context. Id., 426 U.S. at 247-48.

<sup>&</sup>lt;sup>8</sup>Respondent urges this Court to utilize this decisional vehicle to reject attacks statistical application of presumptively valid death penalty statutes as a matter of law, but alternatively submits that petitioner lacks standing to challenge on equal protection grounds the propriety of his death sentence because of an alleged discriminatory impact on black victims. See, Britton v. Rogers, 631 F.2d 572 (5th Cir. 1980), cert. denied, 451 U.S. 939 (1981). As the jury in each of the courts which and federal Florida considered or reviewed this case have Hitchcock's conduct determined. deserving of the ultimate penalty; accordingly, he should not be heard to complain that his death penalty determination was improper because the lives of black victims have allegedly been devalued by our society in other cases. Indeed, this Court has not chosen to fashion such a remedy in comparable situations by abolishing statutes which are racially neutral on their face. See, Briscoe v. Lahue, 460 U.S. 325 (1983).

studies vis-a-vis the amazingly complicated nature of capital sentencing procedures, it is impossible to prove or create an inference of intentional or purposeful discrimination against the backdrop of a capital sentencing statute specifically deemed sufficient by this Court to guide sentencing discretion and control arbitrary, and discriminatory sentencing results.

In <u>Pulley v. Harris</u>, 465 U.S. 37 (1984) this Court rejected the assertion that proportionality review was a constitutional prerequisite in the death penalty process. The Court further opined that while a capital sentencing scheme may produce occasional "abberational outcomes" the system could not be expected to be perfect. <u>Id.</u>, at 881. The <u>Pulley Court's rejection of the necessity of comparative</u>

where a properly drafted statute controlling for arbitrariness through adequate guidelines for the imposition of death is involved (e.g., Florida's death penalty law) undermines Hitchcock's effort to require just such a comparative evaluation vis-a-vis sentences in black victim capital cases.

The McCleskey case also pending tribunal presents before this statistical study of greater magnitude than the limited statistical evidence presented to the Florida courts in this case or the Gross and Mauro study belatedly presented to the federal The Baldus study in McCleskey courts. attempts to consider far more variables than the Florida studies, yet it still did not and could not control for all conceivable variables under the "extremely

complicated" Georgia death penalty process "in which no single factor or group of factors determines the outcome of a given case." McCleskey v. Kemp, 753 F.2d, 877, 896 (11th Cir. 1985). Even under this more detailed statistical data, the McCleskey court properly determined that Baldus' statistics alone could still not support a finding of an arbitrary or discriminatory result in McCleskey's case. The conclusion of the McCleskey court is most informative and assists in outlining the basic faults in utilizing strictly statistical evidence attempting to find fault with the Georgia (or Florida) death penalty statutes as applied since in requiring that the sentencer in death penalty cases be afforded a measure of discretion, the resultant injection of numerous factors which cannot be controlled for necessarily

undermines the value of the statistical data obtained:

The Baldus approach, however, the would take cases different results on what are contended to be duplicate facts, where the differences could not be otherwise explained, and conclude that the different result was based on race alone. From a legal perspective, petitioner argue that since the difference is not explained by facts which the social scientist thinks satisfactory to explain differences, there is a prima facie case that the difference was based on unconstitutional factors, and the burden would shift to the state to prove the difference in results from constitutional This approach considerations. ignores the realities. It not ignores only quantitative differences in cases: looks, age, personality, education. profession, job, clothes, demeanor, and remorse, just to name a few, but it is incapable of measuring qualitative differences of such things as aggravating and mitigating factors. There are, in fact, no exact duplicates in capital crimes and capital defendants. The type of research submitted here tends to show which of the directed factors were effective, but is of restricted use in showing what undirected

factors control the exercise of constitutionally required discretion.

\* \* \*

Viewed broadly, it would seem that the statistical evidence presented here, assuming its validity, confirms rather than condemns the system. In a state where past discrimination is well documented, the study showed no discrimination as to the race of the defendant. The marginal disparity based on the race of the victim tends to support the state's contention that the system is working far differently from the one which Furman condemned. In pre-Furman days, there was no rhyme or reason as to who got the death penalty and who did not. But now, in the vast majority of cases, the reasons for difference are well documented. That they are not so clear in a small percentage of the cases is no reason to declare the entire system unconstitutional.

Id. 753 F.2d at 899.

McCleskey court properly found the Baldus study insufficient to demonstrate constitutional invalidity in the

application of Georgia's death penalty statute, then that court's similar rejection of the Florida studies at issue here as even less compelling should likewise be accepted even if this Court ultimately rejects the respondent's basic assertion that statistical studies in the capital sentencing context must be deemed insufficient as a matter of law to challenge the application of a death penalty statute otherwise validated by this Court. The studies at issue in this case clearly do not control for anywhere near the number of factors involved in the operation of Florida's death penalty law from the investigative phase through trial, sentencing, and appeal. These even less were, therefore studies deserving of legal consideration than the Baldus statistics which the Eleventh Circuit has determined legally

insufficient to support Eighth or Fourteenth Amendment challenges to the Georgia statute. Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); Ross v. Kemp, 756 F.2d 1483 (11th Cir. 1985); McCleskey v. Kemp, supra. See also, Rook v. Rice, 783 F.2d 401,407 (4th Cir. 1986) (rejecting argument that North Carolina's capital statute was being arbitrarily and discriminatorily applied based upon the race of the victim since the data and testimony submitted by Doctor Gross insufficiently demonstrated a pattern of discrimination in application intentional discrimination).

The individualized sentencing determination required in the capital sentencing context requires consideration of all relevant non-statutory mitigating factors (see argument Point I) in

with various statutory conjunction aggravating circumstances thus injecting numerous non-racial variables into the process to be combined with the multitude of factors also inherent in pre-trial investigation as well as the trial itself (e.g., the ease or difficulty in the collection, marshalling, and presentation of legally admissible evidence; the weight attached to such evidence by the fact finder: the skill and experience of the prosecutor as well as his perception of the case, etc.). How can it be said then that statistical data which cannot control for such factors can ever be relied upon society based demonstrate to a discrimination against black victims in Florida, Georgia, and virtually nationwide, when no such society based prejudice is demonstrated against black defendants in the death penalty context?

Is it not more reasonable to assume that the lack of race of defendant-based discrimination evident in the statistics demonstrates that the statutes deemed sufficient to control arbitrariness and discrimination by this Court functioning well, than to assume that some invidious, deep-seated race of victimbased discrimination has nevertheless infested our society and is manifesting itself throughout the death penalty process and skewing the imposition of the ultimate penalty? Certainly, if racial discrimination was the motivating factor in the alleged disparity in death sentences for white victims then that bias would be expected to reveal itself in the more direct form of discrimination based upon the race of the killer.

It has become clear that capital punishment continues as an accepted and

necessary component in a majority of this country's penal systems as demonstrated by the resurrection, by a multitude of jurisdictions, of the penalty after Furman in various forms hoped to be sufficient to somewhat unspecific the satisfy requirements of the plurality. Some states failed to correctly guess the eventual import of Furman and their mandatory death penalty statutes were rejected, Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); but others, including Florida, drafted statutes which guided the sentencer's discretion and provided other the ultimate sentencing checks on determination (e.g., through automatic state appellate review proceedings) to further assure that the arbitrariness, capriciousness and discrimination, targeted in Furman would be removed. Now

ten years after Florida's reformed death penalty law was specifically validated against arbitrariness challenges by this Court and a modicum of success achieved in carrying out the will of its people in punishing with death those who have been convicted and sentenced under the constitutionally validated system and the painstaking review that accompanies such sentences at both the state and federal court level, the claim is raised that this Court should once again allow arbitrariness challenges to that statute upon mere statistical data which at best suggests the possibility of a race of victim based disparity in sentencing. Would justice be served by invalidating an otherwise constitutional expression and application of the collective will of the people of a sovereign state upon such an inexact statistical basis where to do so

claimed alleviate the would not prejudice, (i.e., the devaluation of the lives of black murder victims) and would simply assure that all those sentenced to death for murdering whites (even those who rape and murder thirteen year olds) would deemed punishment the receive not necessary and appropriate by the people of Florida, the trial jury, the trial judge, and the Florida Supreme Court in this case because of an alleged societal prejudice which appears only when a black is the victim of a murder and not when he is in fact the murderer? If we accept the petitioner's premise, would it not then be necessary to preclude executions for all those who murder black victims to ensure consistency and non-discrimination application -- a strange remedy to the perceived problem of receiving adequate retribution for the murderers of blacks and adequate enforcement of the death penalty statute to protect the black population.

Furthermore, if such society based race of victim discrimination occurs in death cases where Florida judges actually impose the sentence, is it not reasonable to assume that such invidious discrimination exists at all levels of criminal punishment necessitating the invalidation of all state penal statutes? Does "equal protection" in such an imperfect society therefore require that no one be punished no matter how deserving of punishment under their peculiar factual circumstances so as to assure equality in application, or more correctly, non-application, of a facially non-discriminatory statute because of pervasive subconscious prejudice possibly demonstrated by mere statistical data?

To ultimately accept the petitioner's race-of-victim disparity argument would be to reject in toto Florida's death penalty statistical statute upon mere possibility of a non-governmental societal prejudice without apparent hope of correction especially since the specific perpetrator or perpetrators (be they mere investigators, prosecutors, citizens, juries, or judges) of this alleged punishment disproportionate remain unidentified. Gross and Mauro, supra, at pp. 106-110. Florida like a majority of states, has invested its time and energy and answered the demands of its people by death penalty statute drafting sufficient to address the concerns of and that statute has been Furman determined by this Court adequate to channel discretion and presumptively remove arbitrariness and discrimination in

capital sentencing. Sixteen men have been executed in this state and hundreds more prosecuted, convicted, and sentenced under the implicit assurance that in applying the new statute as drafted the state could seek to impose the punitive will of its people through the ultimate penalty in the appropriate situation. Many others have been executed under statutes in other states which may very well have this same form of inherent prejudice lurking in its citizens and officials but which have not been the subject of studies or adequate statistical data. Hitchcock has not alleged nor can he demonstrate that he was sentenced to death because his victim was white. Indeed, the heinousness of his crimes speak for themselves. It would be utterly preposterous to assert in this case that had he raped and murdered a thirteen-year-old black girl that the

death penalty would not have resulted. He has neither alleged nor demonstrated an intentional governmental effort to discriminate against him or others in the application of Florida's death penalty statute upon any racial factor. To accept his argument that no matter how grievous his crime he should be absolved of the proper and ultimate punishment for its commission upon the mere statistical conjecture presented will not only serve to clearly undermine the continued application of any death penalty statue in nation this but will also clearly "devalue" the life of the young female victim brutalized by the petitioner as well as the society that depends upon its proper y enacted death penalty law to serve its retribution and deterrence functions.

### CONCLUSION

Based on the above and foregoing, we respectfully request this Court to affirm the judgment of the Eleventh Circuit Court of Appeals which determined that Hitchcock was entitled to no habeas relief.

Respectfully submitted,

JIM SMITH ATTORNEY GENERAL

Sean Daly Assistant Attorney General 125 North Ridgewood Avenue Fourth Floor Daytona Beach, Florida 32014 (904) 252-1067

COUNSEL FOR RESPONDENT

No. 85-6756

Supreme Court, U.S., E I L E D

OCT 2 1986

JOSEPH F. SPANIOL, JR. CLERK

### IN THE

## Supreme Court of the United States

OCTOBER TERM, 1986

JAMES ERNEST HITCHCOCK,

Petitioner,

V.

LOUIE L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

### REPLY BRIEF FOR PETITIONER

RICHARD L. JORANDBY
PUBLIC DEFENDER
15th Judicial Circuit of Florida
CRAIG S. BARNARD\*
CHIEF ASSISTANT PUBLIC DEFENDER
RICHARD H. BURR III
ASSISTANT PUBLIC DEFENDER
The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150
Counsel for Petitioner
\*Attorney of Record

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#### ARGUMENT

I FLORIDA'S PRE-LOCKETT CAPITAL SENTENCING STATUTE OPERATED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BY ENFORCING THE "MANDATORY LIMITATION" THAT ONLY THOSE MITIGATING CIRCUMSTANCES "ENUMERATED" IN THE NARROW STATUTORY "LIST" COULD BE CONSIDERED

In responding to Mr. Hitchcock's claim under Lockett v. Ohio, 438 U.S. 586 (1978), Wainwright has failed to answer the fact that the constitutional deficiencies in the Florida law at the time acted in this case to deny what the Eighth Amendment demands. Wainwright does not deny that the Florida capital sentencing statute was intended by the Florida legislature to restrict consideration of mitigating circumstances to the factors enumerated in the statute. Instead he urges the Court to disregard that legislative history. He does not deny that the Florida Supreme Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), confirmed that this was the intent of the legislature. Instead he urges the Court to read ambiguity into the holding of Cooper-where there is none-and to find that the Cooper court's concern for the relevance of mitigating evidence was the same as the Court's concern for relevance in Lockett. He does not deny that the record in this case may reflect counsels' and the trial court's belief that the consideration of nonstatutory mitigating evidence was severely limited under Florida law. Instead he urges the Court to hold that so long as this limitation was not absolute-so long as one "single bit" of nonstatutory mitigating evidence was proffered and not excluded-there could be no violation of the Eighth Amendment rule of Lockett. When each of Wainwright's arguments is analyzed, the strength of Mr. Hitchcock's Lockett claim is not only unrebutted but is further confirmed.

The major thrust of Wainwright's argument is that the Florida capital sentencing statute was never enforced to preclude the consideration of nonstatutory mitigating circumstances. To make such an argument, Wainwright first dismisses the legislative history restricting consideration of mitigating factors to the statute's list as being "of no consequence." BR 27.1 Then, Wainwright says that despite what the legislature intended and despite what the statute said ("as enumerated"), in actuality the Florida Supreme Court applied a relevancy test for mitigating circumstances which was consistent with Lockett v. Ohio.

Mr. Hitchcock agrees that relevancy may have been the test applied by the Florida Supreme Court in Cooper, but its definition of relevancy was too narrow to be compatible with the broad test of relevancy articulated in Lockett. Mitigating evidence was not admissible in Florida unless it was strictly "relevant" to a statutorily enumerated mitigating circumstance:

The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have (sic) no place in that proceeding.

Cooper v. State, 336 So.2d at 1139 (emphasis supplied). There was "no place" in Florida capital sentencing proceedings for any "evidence" that did not "concern" an "itemized" mitigating circumstance. This relevancy test was even narrower than that of the Ohio statute stricken in Lockett which allowed nonstatutory mitigating evidence to be presented but precluded its independent consideration. Wainwright's contention that Florida's test of

relevancy was in harmony with the Eighth Amendment is thus defeated by the plain and unequivocal analysis of the Florida Supreme Court itself.

Wainwright's dismissal—as being "of no consequence"—of all that preceded Cooper's articulation of relevancy is equally unavailing. It is this history that not only led the Florida Supreme Court to its holding in Cooper but that also caused the Attorney General of Florida to advocate for the very result that the court reached in Cooper. The Attorney General's present attempt in Mr. Hitchcock's case to dismiss such a history as of no consequence—when the effect of that history upon reasonable lawyers and judges is the very issue presented by Mr. Hitchcock—is thus disingenuous.

In Cooper the argument was made by the defendant that he should have been allowed to present mitigating character evidence, such as his stable employment record, to demonstrate his potential for rehabilitation. In response the Attorney General urged that the argument be rejected because such evidence did not fall within the statutory list of mitigating circumstances:

Appellant urges the court erred in refusing to allow "evidence" to be introduced to show the defendant was capable of being rehabilitated. There is nothing contained in the statute which suggests "potential for rehabilitation" is a mitigating factor to be considered by the jury and/or sentencing judge.

Cooper v. State, Brief of Appellee, at 33.2

 $<sup>^1</sup>$  References to the Brief for Respondent will be designated by the symbol "BR\_\_\_\_\_."

<sup>&</sup>lt;sup>2</sup>The Brief of Appellee was filed on July 17, 1975 in the Supreme Court of Florida, Vernon Ray Cooper v. State of Florida, Case No. 45,966. A copy of that brief has been provided to the Clerk of the Court.

Thus, the Florida Attorney General's present effort to persuade the Court to ignore the legal environment in which Mr. Hitchcock's counsel investigated, presented, and argued mitigating evidence, and in which the judge and jury considered mitigating evidence, must be rejected out of hand. It is nothing more than legal sleight of hand, based upon the need for a particular result rather than upon principled legal analysis. As the briefing in Cooper reveals, at the time of Cooper the Florida Attorney General also believed that Florida's capital statute limited permissible mitigating evidence to the narrow statutory list, and he urged that position upon the Florida Supreme Court as a basis for precluding consideration of relevant mitigating evidence. The Florida Supreme Court agreed with the Florida Attorney General's positionholding that such evidence was properly excluded under the statute's "mandatory limitation." The Florida Attorney General cannot so glibly dismiss this legislative and litigation history when his predecessors adopted the very same view of the Florida statute that Mr. Hitchcock's lawyer adopted.3

At bottom, Wainwright's distortion of the unequivocal holding of *Cooper*, his off-handed dismissal of the highly relevant pre-*Lockett* history of interpretation and application of the Florida statute, and indeed his incantation of the need for case-by-case review, are based upon a fundamental misunderstanding of the holding in *Lockett*. Most revealing of this fundamental confusion is Wainwright's

position that "[a]s long as one single bit of non-statutory evidence was even attempted to have been introduced, the basis for [Mr. Hitchcock's Lockett] claim totally evaporates." BR 47. In Wainwright's view, unless counsel failed to proffer any of the available nonstatutory mitigating evidence, there can be no Lockett violation. Similarly, unless the trial judge excluded altogether the proffered nonstatutory mitigating evidence, there can be no Lockett violation. According to this view, so long as one scintilla of nonstatutory mitigating evidence is proffered by counsel and not explicitly excluded from evidence by the judge, there can be no Lockett violation.

This is an extreme position, acceptance of which would require the Court to overrule Eddings v. Oklahoma, 455 U.S. 104 (1982); and Skipper v. South Carolina, 106 S.Ct. 1669 (1986). In each of these cases more than "one single bit" of nonstatutory mitigating evidence was introduced and considered, but the Eighth Amendment mandate was nevertheless unsatisfied. The Eighth Amendment demands true individualized consideration at the selection stage of a capital case; such consideration demands that independent mitigating weight be given to all mitigating factors, not merely to "one single bit" of mitigation. Wainwright's argument is thus reflective of the erroneous interpretation of the Lockett mandate that has consistently characterized Florida's application of its restrictive statute.

In this light, Wainwright's repetitive reference to the few biographical facts that made it into Mr. Hitchcock's record is unavailing.<sup>4</sup> Though counsel for Mr. Hitchcock

<sup>&</sup>lt;sup>3</sup> Wainwright's criticism of this Court, the Court of Appeals, other courts and judges, and all legal commentators for "the ease" with which they have "interpreted [Cooper] as limiting the introduction of mitigating circumstances to those enumerated in the statute,'" BR 22, rings hollow. The Florida Attorney General himself held that view and urged it upon the court; he cannot now fault others for agreeing with him.

<sup>&</sup>lt;sup>4</sup> These facts have been discussed in Mr. Hitchcock's opening brief, and with one exception, need no further discussion in light of Wainwright's argument. The exception is that Wainwright, without record citation, says that the jury was presented with evidence of Mr. Hitchcock's background of extreme poverty. That is false; no such evidence was presented. See Brief for Petitioner, at 33 n.49.

did introduce these bits of nonstatutory mitigating evidence, he could have introduced much more nonstatutory evidence but for the limitation of Florida law. But for the limitation of Florida law, the jury and judge as well could have given independent weight to this evidence and counsel could have argued that such evidence alone might support a life sentence. At best the record reveals an inadequate attempt by counsel to shoehorn a few meager biographical facts into the narrow mold of the statutory mitigating factors that were under consideration by the jury and judge.

Despite Wainwright's efforts, therefore, the truth cannot be hidden. The truth is that Florida law was intended to restrict mitigating factors to those listed in the statute; the "mandatory limitation" in the statute was enforced by the Florida Supreme Court so as to meet the then-perceived mandate of Furman; and the record in this case shows that limitation in action. The result was a capital sentencing determination in this case that violated the letter and spirit of Lockett.

II THE CLAIM THAT THERE IS SYSTEMATIC RACEOF-VICTIM-BASED DISCRIMINATION IN THE IMPOSITION OF DEATH SENTENCES IN FLORIDA
CANNOT BE SUMMARILY DISMISSED WHEN THE
STATISTICAL ANALYSIS PROFFERED IN SUPPORT
OF THE CLAIM HAS SHOWN A LARGE RACE-BASED
DISPARITY, AND TO A SIGNIFICANT EXTENT, HAS
ELIMINATED THE MOST COMMON NONDISCRIMINATORY REASONS FOR IT

In response to the claim that there is systematic raceof-victim-based discrimination in the imposition of death sentences in Florida, Wainwright has made little effort to rebut Mr. Hitchcock's argument that he has alleged a prima facie case of discrimination under the Eighth and Fourteenth Amendments. Instead Wainwright has sought to trivialize Mr. Hitchcock's claim, has argued that the Court's prior approval of Florida's capital sentencing procedure insulates it from such a claim, and has conjured up a parade of horribles that would be unleashed by a decision in Mr. Hitchcock's favor. None of these arguments detracts from Mr. Hitchcock's showing of a prima facie violation of his rights under the Eighth and Fourteenth Amendments. They should not, therefore, prevent the Court from reaching the serious constitutional questions presented.

Wainwright attempts to trivialize Mr. Hitchcock's claim by arguing that he has no real interest at stake since the discrimination he alleges is directed against black victims rather than white defendants:

As the jury [sic] in each of the Florida and federal courts which considered or reviewed this case have determined, Hitchcock's conduct is deserving of the ultimate penalty; accordingly, he should not be heard to complain that his death penalty determination was improper because the lives of black victims have allegedly been devalued by our society in other cases.

BR 65 n.8 (emphasis in original). See also BR 76-78. Such an argument confuses the right that black victims or potential black victims might assert with the right asserted by Mr. Hitchcock.

While Mr. Hitchcock may not have any standing to assert the equal protection rights of black victims, he does not seek nor has he sought to protect those rights. Rather he seeks protection of his own right—guaranteed to him under the Equal Protection Clause and under the Cruel and Unusual Punishments Clause—not to be sentenced on the basis of impermissible or arbitrary racial considerations. The racial considerations that he alleges have

affected his sentence determination are plainly impermissible and arbitrary because they are the vestiges of a system of slavery, in which white-victim crimes were routinely punished more severely than black-victim crimes. Because his crime involved a white victim and because in Florida such crimes are far more likely to result in the imposition of death sentences, Mr. Hitchcock has alleged that there was at least a risk in his case that his sentence was based upon consideration of the victim's race. The victim's race may well have acted as an additional aggravating factor that tipped the balance of sentencing considerations in his case toward death.

The attempt to trivialize such a claim has no place in our jurisprudence. Surely if there were direct evidence that Mr. Hitchcock's sentencing jury recommended death at least in part because of an expressed racial identity with

Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan. L. Rev. 27. 108 (1984). Though such racial consideration is unconscious, it can still be "intentional" for Fourteenth Amendment purposes. See Alexander v. Louisiana, 405 U.S. 625, 632 (1972) ("The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner") (quoting Hernandez v. Texas, 347 U.S. 475, 482 (1954)).

the victim, the State of Florida would not argue that such a recommendation was constitutionally tolerable. See Zant v. Stephens, 462 U.S. 862, 885 (1983) (if a state "attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant ... due process of law would require that the jury's decision to impose death be set aside").6 That there is only circumstantial evidence, not direct evidence, that Mr. Hitchcock's sentencing decision was influenced by the victim's race—drawn from the systematic disparity in the imposition of death sentences in Florida that reflects the race of the victim as a significant factor in sentencing decisions-should lead to no different conclusion. For even if there is only a "substantial risk" that a death sentence may have been imposed arbitrarily, the sentence cannot stand, Gregg v. Georgia, 428 U.S. 153, 188 (1976).7 And at the very least, Mr. Hitchcock has shown prima

<sup>&</sup>lt;sup>5</sup> As Professor Gross has explained, "consideration" of the victim's race in a capital sentencing determination is likely an unconscious phenomenon based upon jurors' greater empathy for white victims.

We are more readily horrified by a death if we empathize or identify with the victim, or see the victim as similar to a relative or friend, than if the victim appears to us as a stranger. In a society that remains segregated socially if not legally, and in which the great majority of jurors are white, jurors are not likely to identify with black victims or see them as family or friends. This reaction is not an expression of racial hostility, it is simply a reflection of an emotional fact of interracial relations in our society.

<sup>&</sup>lt;sup>6</sup> In this context, consideration of the victim's race as an aggravating factor is also "constitutionally impermissible" and "totally irrelevant to the sentencing process."

Given the constitutional necessity of heightened reliability in capital sentencing decisions, the Court has never required, since its decision in Furman v. Georgia, 408 U.S. 238 (1972), that there be anything more than "a substantial risk" of arbitrary imposition of the death sentence in order for a particular death sentence to be stricken, See, e.g., Gardner v. Florida, 430 U.S. 349, 357-59 (1977); id. at 363-64 (White, J., concurring); Lockett v. Ohio, 438 U.S. at 604-605; Godfrey v. Georgia, 446 U.S. 420, 427 (1980); Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Eddings v. Oklahoma, 455 U.S. at 119 (O'Connor, J., concurring); Zant v. Stephens, 462 U.S. at 874, 884-85; Barclay v. Florida, 463 U.S. 939, 950 (1983); California v. Ramos, 463 U.S. 992, 999 (1983); Caldwell v. Mississippi, \_\_\_\_\_ U.S. \_\_\_\_, 105 S.Ct. 2633, 2647 (1985) (O'Connor, J., concurring); Skipper v. South Carolina, 106 S.Ct. at 1676 n.2 (Powell, J., concurring); Turner v. Murray, \_\_\_\_\_ U.S. \_\_\_\_, 106 S.Ct. 1683, 1687-88 (1986).

facie, sufficient to survive summary dismissal, a substantial risk that his sentence was in part the product of racially-based considerations. A claim of this sort cannot be trivialized.

The second argument that Wainwright makes in an effort to divert the Court from deciding the issues presented rests upon the premise that "Florida's reformed death penalty law was specifically validated against arbitrariness challenges by this Court [in Proffitt v. Florida, 428 U.S. 242 (1976)]." BR 76. Because of this "validation," Wainwright argues, the Florida statute is immune to attack on the basis of its systematically arbitrary application. But the Court's 1976 "validation" of the capital sentencing procedures of Florida, Georgia, and Texas manifestly did not insulate them from future claims that the procedures are applied systematically in an arbitrary or discriminatory fashion. At most, the Court decided in its 1976 cases that "[o]n their face these procedures . . . appear to meet the constitutional deficiencies identified in Furman." Proffitt v. Florida, 428 U.S. at 251 (emphasis supplied).

In the post-Proffitt-Gregg-Jurek era, the Court has emphasized that its approval of the facial validity of these states' capital sentencing procedures constitutes something less than a licensing of any and every result which they produce. Each state has "a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty," Godfrey v. Georgia, 446 U.S. at 428 (emphasis added); and the rationale underlying these cases "recognized that the constitutionality of [these states'] death sentences ultimately would depend on the [state] Supreme Court construing the statute and reviewing capital sentences consistently with . . . [the] concern [of Fur-

man]. "Zant v. Stephens [I], 456 U.S. 410, 413 (1982) (per curiam). Thus, for example, if "Georgia attached the 'aggravating' label to factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as . . . the race . . . of the defendant, . . . due process of law would require that the jury's decision to impose death be set aside." Zant v. Stephens [II], 462 U.S. at 885. Accordingly, Proffitt v. Florida is not the judicial panacea for the state that Wainwright now says it is.

The final diversionary tactic utilized by Wainwright is to dredge up the horrible consequences that he says would follow from a ruling in Mr. Hitchcock's favor. Two specific spectres are invoked: the "reasonable . . . assump[tion] that . . . invidious discrimination exists at all levels of criminal punishment necessitating the invalidation of all state penal statutes," BR 78; and the necessity of "reject[ing] in toto Florida's death penalty statute," BR 79. Despite Wainwright's incantations, neither of these dire consequences would follow from a ruling in Mr. Hitchcock's favor.

The invalidation of all state penal statutes would not be necessary in light of such a ruling. First, it is not "reasonable to assume" that the racial considerations operative in capital sentencing proceedings are also operative in non-capital proceedings. Indeed, the "empirical evidence of racial discrimination is considerably stronger and more consistent for capital punishment than for other criminal sanctions." Gross & Mauro, 37 Stan. L. Rev. at 123 (citing Kleck, Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty, 46 Am. Soc. Rev. 783 (1981)). Moreover, the more reasonable assumption would be the opposite of Wainwright's assumption, for "there is a

unique opportunity for racial prejudice to operate but remain undetected" in a capital sentencing proceeding, in contrast to a non-capital proceeding, "[b]ecause of the range of discretion entrusted to a jury in [such a proceeding]." Turner v. Murray, 106 S.Ct. at 1687. Finally, even if there were the same racial considerations operative in non-capital proceedings, the Constitution would allow greater latitude for their operation. So long as there was only a risk of racially-influenced results, that risk could be tolerable in non-capital proceedings despite being intolerable in capital proceedings. See Turner v. Murray, 106 S.Ct. at 1688 & n.8 (distinguishing Ristaino v. Ross, 424 U.S. 589 (1976)).

Similarly, a ruling in Mr. Hitchcock's favor need not lead ultimately to the abolition of the death penalty in Florida. As explained in the Brief for Petitioner in *McCleskey* v. *Kemp* (No. 84-6811), at 107-09, at least under the Fourteenth Amendment, the state would be entitled "to prove that, because of the extreme aggravation of a particular homicide, a death sentence would have been imposed, irrespective of racial considerations." Thus, the State could presumably continue to carry out death sentences in cases of extreme aggravation.<sup>8</sup>

More importantly, as Mr. Hitchcock argued in his opening brief, at

For these reasons, Wainwright's arguments should not divert the Court from reaching the issue presented: whether the claim that there is systematic race-of-victim-based discrimination in the imposition of death sentences in Florida can be summarily dismissed as "wholly incredible" when the statistical analysis proffered in support of the claim has shown a large race-based disparity, and to a significant extent, has eliminated the most common non-discriminatory reasons for it.

<sup>&</sup>lt;sup>8</sup> Although Wainwright invokes no other spectres, the State of California in its amicus brief has invoked a third spectre that requires a brief response. At pages 1-7 and 12-30 of its brief, California has gone to great lengths to paint a detailed picture of the burdensome discovery measures that might be invited in Florida and other states if the Court rules in Mr. Hitchcock's favor. This non-record picture should be viewed with extreme caution, for it is an advocate's painting and has apparently been exaggerated in a number of material respects. See Letter of Professor Richard A. Berk to Counsel for Petitioner Hitchcock (copy provided to Clerk of the Court).

<sup>53-54,</sup> discovery procedures need not become cumbersome or unfairly burdensome if they are available only after a prima facie case has been alleged, if they are utilized to narrow the issues in dispute, and if they are undertaken with reference to factual issues already settled in the major studies of capital sentencing undertaken in Georgia and Mississippi.

#### CONCLUSION

For these reasons as well as for the reasons advanced in the Brief for Petitioner, petitioner respectfully requests that the Court vacate the judgment of the Court of Appeals and remand as requested in his opening brief.

Respectfully submitted,

RICHARD L. JORANDBY
PUBLIC DEFENDER
15th Judicial Circuit of Florida
CRAIG S. BARNARD
CHIEF ASSISTANT PUBLIC DEFENDER
RICHARD H. BURR III
ASSISTANT PUBLIC DEFENDER
The Governmental Center/9th Floor
301 North Olive Avenue/9th Floor
The Governmental Center
West Palm Beach, Florida 33401
(305) 820-2150

Supreme Court, U.S. F. I. L. E. D.

# SUPREME COURT OF THE UNITED STATESEP

JOSEPH F. SPANIOL, JE

October Term, 1986

JAMES ERNEST HITCHCOCK,

Petitioner,

VS.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Brief of Amici Curiae State of California, by John K. Van de Kamp, Attorney General, and County of Los Angeles, by Ira Reiner, District Attorney, In Support of Respondent

JOHN K. VAN DE KAMP Attorney General of the State of California IRA REINER
District Attorney
of Los Angeles
County

MICHAEL C. WELLINGTON Supervising Deputy Attorney General GEORGE M. PALMER Deputy District Attorney

SUSAN LEE FRIERSON Deputy Attorney General HARRY B. SONDHEIM
[Counsel of Record]
Head Deputy
District Attorney
849 South Broadway
11th Floor
Los Angeles,
California 90014

(213) 974-5917

3580 Wilshire Boulevard, Suite 800 Los Angeles, California 90010 (213) 736-2236

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Amici curiae, the State of California by John K. Van de Kamp, Attorney General, and the County of Los Angeles, a political subdivision of the State of California by Ira Reiner, District Attorney submit this brief in support of respondent pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

### INTEREST OF AMICI CURIAE

John K. Van De Kamp, Attorney General for the State of California and Ira Reiner, District Attorney for the County of Los Angeles, State of California, jointly represent the People of the State of California in the case of In re Earl Lloyd Jackson, Crim. 22165, pending before the California Supreme Court on petition for writ of habeas corpus. Said case is pending before a referee appointed by the California Supreme Court to take evidence on three issues, one of which is

highly pertinent to the instant case:
Whether "death sentences in California
have been discriminatorily imposed on the
basis of (1) the race of the victim;

- (2) the race of the defendant; and/or
- Amici curiae have been litigating just the discovery aspect of this case for over two years. This order for a reference hearing was granted on the basis of a statistical analysis of limited data on death and life-without-possibility-of-parole (LWOPP) cases. It is the theory of the defense in <u>Jackson</u> that a statistical analysis of death and LWOPP cases will show that persons who kill white victims,

and male, black defendants are more likely to be charged with and to receive the death penalty because of these unconstitutional racial/gender factors than are persons in other racial/gender categories.

Defendant Jackson, who is black, was charged with murdering two elderly white women in two separate burglaries of their residences in August and September 1977.2/
These charges made him eligible for the death penalty pursuant to California Penal Code section 190 et seq.3/ After a jury

<sup>1.</sup> All of the factual representations made in this brief are based upon matters set forth in the record as well as the personal experiences of the government attorneys who have litigated, before the California Supreme Court and its appointed referee, the petition for writ of habeas corpus in the <u>Jackson</u> case.

<sup>2.</sup> The race of defendant Jackson as well as the race of his two victims are not alleged or referred to in the information.

<sup>3.</sup> The law under which Jackson was convicted and sentenced (Stats. 1977, Ch. 316), enacted August 11, 1977, requires that one or more "special circumstances" be alleged and found true by the trier of fact before capital punishment may be imposed. This law was repealed, and essentially reenacted as modified, by the "Briggs Initiative", passed by the voters and effective November 7, 1978, principally to expand the number of special circumstances making a person eligible for capital punishment.

verdict finding him guilty as charged and imposing the death penalty, a judgment was rendered in March 1979, sentencing him to death. On his automatic appeal to the California Supreme Court, the judgment was affirmed and a concurrent petition for writ of habeas corpus was denied. People v. Jackson (1980) 28 Cal.3d 264. The law under which defendant Jackson was sentenced has been held constitutional on its face by this Court and the California Supreme Court. Pulley v. Harris, 465 U.S. 37 (1984); People v. Frierson, 25 Cal.3d 142, 172-195 (1979).

Defendant Jackson filed a subsequent petition for writ of habeas corpus, which is the basis for a reference hearing ordered by the California Supreme Court.

That court first ordered a reference hearing to address two unrelated issues.

expand the reference hearing on the theory
that a statistical analysis of capital
case data showed evidence of race and
gender discrimination in violation of the
Eighth and Fourteenth Amendments to the
Federal Constitution.

In support of his application, he offered inter alia the declaration of Dr. James Cole, Ph.D., a statistician, who analyzed race and gender homicide data published annually by the Bureau of Criminal Statistics (BCS), a division of the State Attorney General's office, and data supplied by the State Public Defender's Office. Using a total of three variables (victim race, defendant race, defendant sex) for all state-wide homicides, all state-wide robbery murders, and all robbery-murders in Los Angeles County, in various combinations of what is principally a cross tabulation analysis,

Dr. Cole concluded, without reference to

other circumstances of any cases, that

killers of white victims are five times

more likely to receive the death penalty

than killers of non-white victims.

Similar high proportions were found for

Black and male defendants when compared to

other groups.

On this basis, the reference hearing was ordered expanded to address the issue of whether death sentences in California have been discriminatorily imposed on the basis of race of victim, race of defendant, or gender of defendant.

Since a principal issue in the instant case is whether petitioner

Hitchcock is entitled to a hearing on virtually the same issues, based on his presentation of three general statistical studies of Florida capital cases, amici

curiae have concluded that the outcome of the instant case will have a substantial impact upon the administration of criminal justice, and the death penalty law in particular, throughout California. Amici's experience in the Jackson case has made us familiar with the nature of the discrimination issues and the arguments offered by petitioner in this case. Further, amici's experience in complying with court-ordered discovery of a virtual mountain of statewide California homicide data, as well as an assessment of the quality of that data, may prove to be of value to this Court in deciding whether petitioner Hitchcock should be permitted to proceed with a hearing in the District Court as he requests.

#### SUMMARY OF ARGUMENT

The District Court properly denied petitioner's request for a hearing on his

generalized claim that Florida's capitalsentencing system is applied in an arbitrary, capricious and irrational manner.

Petitioner was not entitled to a hearing
on this claim. He neither asserted a
deprivation of a constitutional right nor
alleged facts which would establish one.

Petitioner offered only unsupported and
contradicted statistical conclusions of
disparate impact of the death penalty in
Florida. His claim and his showing were
inadequate as a matter of law.

When a state imposes its death

penalty under a constitutional system

which by its very design minimizes any

risk of arbitrariness, generalized claims

of arbitrariness in the imposition of that

state's death penalty should be foreclosed.

Only a particularized and factually

supported claim of purposeful invidious

discrimination in the imposition of

petitioner's own death sentence should have entitled petitioner to a hearing.

The effect of entertaining generalized attacks on a facially constitutional capital-sentencing system is to undo the last ten years of judicial effort to fashion standards for a constitutional death penalty. It is also to undo the last ten years of legislative effort to respond to those standards. state which has successfully endeavored to institute a constitutional capitalsentencing system should not be required to repeatedly defend that system against generalized claims of arbitrariness and the accompanying related barrages of onerous discovery requests.

Finally, granting such a hearing will lead to a costly and time-consuming data gathering process which will not result in

either reliable data or a reasonable chance of success by petitioner.

#### ARGUMENT

I

THE GRANTING OF AN EVIDENTIARY
HEARING AS REQUESTED BY PETITIONER WILL LEAD TO DISCOVERY
WHICH WILL BE COSTLY, WILL
UNNECESSARILY DELAY PROCEEDINGS,
AND WHICH CANNOT PROVE THAT
RACE WAS A FACTOR OPERATING IN
THE PARTICULAR CASE UNDER REVIEW

The issue in the instant case includes whether the District Court erred in denying petitioner an evidentiary hearing to consider whether Florida's death penalty law is being unconstitutionally applied on the basis of race of victim and gender of defendant. In the Jackson case, supra, the California Supreme Court has already decided to grant such a hearing. What follows is a description of the discovery process which has occurred thus far in Jackson. This discovery process is itself a strong

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reason for upholding the District Court's decision not to grant a hearing in Hitchcock.

A. Data Gathering Is Essential to a Statistical Challenge to the Death Penalty

Data gathering must take place before a statistical challenge to the death penalty can be mounted. Thus, the fact that the law of discovery in California is not precisely parallel to the federal law of discovery (compare: Rule 16, Fed. Rules of Crim. Proc.; United States v. Conder, 423 F.2d 904, 909-911 (6th Cir. 1970); Pitchess v. Superior Court, 11 Cal. 3d 531 (1974); Griffin v. Municipal Court, 20 Cal.3d 300 (1977), is unimportant. Moreover, the fact that data may be gathered in advance of a particular case, not pursuant to court order, is not significant. Regardless of who gathers the data, it will be expensive and time-consuming.

Further, it may result in substantial delay of the proceedings, and the data collected through this process will be neither complete nor accurate in terms of a full and fair description of the cases from which the data is derived.

# B. Problems of Discovery in Jackson

Defendant Jackson moved for discovery of homicide data throughout the state.

This proved to be a motion to compel the People to provide a mountain of homicide data from throughout the state, notwithstanding that much of the data is a matter of public record and equally available to the defendant and his lawyers.

Jackson requested the People provide
the defendant's name, case number, age,
race and gender, and the victim's age,
race and gender in each of four broad
categories of homicide cases, from

August 11, 1977 to the present. This was evidently designed to separate all cases in which special circumstances were alleged in the indictment or information from similar cases in which no special circumstances were alleged. A substantial body of other data and information, some of it readily available to the defendant and his attorneys without the use of subpoenas, was also requested.

Although the data was not located in any single county or other location, and although the District Attorney of
Los Angeles County has no jurisdiction or control over most of the data nor a legal duty to maintain such data, over the People's objection the referee ordered the People "through the District Attorney of Los Angeles County" to provide defendant with homicide data from throughout the state in each of four broad categories, as

well as other data 4/

Specific data requested by Jackson on race of defendant and victim was not

- "(a) The defendant's name, case number and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which any special circumstance was alleged, and which resulted in at least one conviction of murder in the first or second degree or manslaughter.
- "(b) The defendant's name, case number, and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in (1) conviction for murder in the first or second degree or manslaughter, and (2) a conviction for any felony enumerated in Penal Code section 190.2, subdivision (a) (17)...
- "(c)(l) The defendant's name, case number, and county of venue of each homicide prosecution for an offense occurring on or after August 11, 1977, in which no special circumstance was alleged, but which resulted in at least one conviction for first degree murder and at least one other conviction for at

request by the defendant. In addition, the District Attorney of Los Angeles
County was ordered to provide a complete set of its own Special Circumstance
(capital eligible) case files, comprising some 900 plus cases in which special circumstances were initially alleged in the indictment or information. Also ordered provided were copies of each of the computer tapes produced and maintained by (BCS) as well as any surveys, reports, or compilations of data concerning information on capital eligible cases

<sup>4.</sup> The order, as amended, describes the data as follows:

least second degree murder; and
"(2) The defendant's name, case
number, and county of venue of each
homicide prosecution occurring on or
after August 11, 1977, in which no
special circumstance was alleged, but
which resulted in the first degree
murder conviction of a defendant who
had previously been convicted of a
first degree or second degree
murder."

which may be or will be prepared by or for the District Attorney or the California Attorney General.

outside Los Angeles County, and since only the Clerk of the Superior Court of each county is required by law to maintain such information, immediately following the referee's first order of June 26, 1985, the People sent letters to the Clerks of the Superior Court in each of California's 58 counties, asking whether such information was available, how much time it would take to obtain it, and what the estimated cost of such effort would be. 5/ The responses were virtually unanimous in

indicating that the data was not on computers, was not readily available, that a hand search of hundreds if not thousands of individual court files would be required in most of California's counties, and that the process would be laborious, time-consuming and expensive. The Clerk's responses are best exemplified by the Los Angeles County Clerk's response:

"Justice Jefferson's [the referee] discovery order is unprecedented in its scope and, based on the volume of cases to be made available to the petitioner, constitutes an extraordinary request which exceeds our legal duties to provide cases files for review. Staff is not provided in our current budget allocation to pull the large number of files involved and perform whatever other tasks may be required. To avoid disrupting the normal flow of court business and case processing, staff will be required to work overtime.

"Also, it is important to note that our record maintenance systems were never designed to respond to this type of request and, therefore, the identification and pulling of these files will be a tedious, manual process. This order appears to require the performance

<sup>5.</sup> The People considered using District Attorneys' offices throughout the state as a source of data. However, this was unworkable, since District Attorneys are not required by law to maintain such data and do not generally maintain such data in readily retrievable form, if at all.

of tasks beyond our legally mandated duties to maintain cases files and related indices of those files."

Thus, although computers are used in some Clerks' offices in this state, that did not make this an easy task. Some Clerks' offices do not yet use computers. Of those that do, such as Los Angeles County, the computers are not and cannot be programmed to enable these specific bits of information to be retrieved. Indeed, not one Clerk's office in this state maintains the data sought by defendant Jackson, particularly data on race of victim and defendant, in readily retrievable form because there has never been a need for such data.

As a consequence of this near total absence of readily available data, it was anticipated that each Clerk's Office would check the register of actions and make a list of all homicide cases after which the

file for each case would be separately reviewed to determine whether the case fell within one of the four categories.

A hand search of thousands of individual files to determine what the original charges were, when the offenses occurred, whether special circumstances were alleged, and what the outcome of the case was, is no small task. For example, the official superior court file in the Jackson cases consists of two files, each approximately two inches thick. To obtain the desired data, a clerk must find the information or indictment and any amendments thereto, all the verdict forms, and any documents which show the defendant's prior record. Assuming the clerk is familiar with the California Penal Code, the Clerk can then read these documents to obtain the desired information.

In an effort to persuade the referee that the order of discovery was not only contrary to law but very costly and difficult to comply with, the People filed a Motion for Reconsideration. The referee, however, denied this motion and ordered discovery to proceed on January 10, 1986. The People then sought review of this order by the California Supreme Court but also commenced the process of obtaining the data. The process began with the People serving subpoenas duces tecum upon the Clerk of the Superior Court of each of California's 58 counties, requesting four lists of cases, exactly as described in the order of discovery. In order to do this, each clerk was served with a subpoena duces tecum and a cover letter, explaining the nature of the request.

shortly after this was done, however, the referee issued a new discovery order changing one paragraph of his earlier order and the California Supreme Court followed this by denying the People's request to quash the referee's order, but modified that order by changing yet another paragraph. This necessitated a second complete set of subpoenas duces tecum being served upon the Clerks, each with a new cover letter explaining the changes.

Many Clerks' offices had acted to comply with the first subpoena duces tecum. Thus, when the second subpoena duces tecum was served upon them, requesting somewhat different data, a second intensive effort was required to comply with the subpoena.

To assist the Clerks in identifying these cases, relevant albeit incomplete data was also subpoensed from the

Administrative Office of the Courts and the State Public Defender. This data, together with additional data obtained without subpoena from the State Department of Corrections, was provided to the Clerks. However, the process of obtaining even this limited data was time-consuming and, thus, was only marginally helpful to the Clerks.

Almost all of the Clerk's Offices had difficulty understanding the nature of this complicated request for data. Many letters and long-distance telephone calls were necessary to answer questions by the Clerks. Indeed, some Clerks' Offices never completely understood the subpoenas and, thus, required virtual total guidance by lawyers from the Attorney General's and the District Attorney's Offices to obtain the data. This task of obtaining the data from Clerks kept two government lawyers

busy almost full-time for six months; two additional lawyers also occasionally assisted in this effort.

As a consequence of the large volume and complicated nature of the data sought, a substantial portion of Clerks' responses were incomplete, in error, or both. Many responses had to be returned because they were obviously incomplete and in error. Even now, after six months of effort by government attorneys to obtain this limited data, it appears that significant portions of the data are subject to substantial error.

Los Angeles County itself is the best example. The Los Angeles County Clerk's Office is the largest clerk's office in the state, with approximately 2,060 employees, whose duties included handling in excess of 32,000 felony filings in 1985 alone. Although this Office relies

heavily upon computers to accomplish its assigned tasks, the computers could not be used to produce the data requested. The Clerk's Office responded to our second subpoena duces tecum with 130 pages of materials, covering approximately 750 cases, and including several copies of Informations verbatim because the clerks could not understand them. Subsequently, when a problem arose as a result of comparing this data with another compilation of data, the People found it necessary to check the accuracy of the Clerk's data. A government lawyer spent approximately two weeks checking each of 250 case files and found the data is subject to a 50% plus error rate. It was later determined that the Clerk's Office tried to circumvent the necessity of checking every individual case file by relying only upon the register of actions,

which contained many errors and omissions.

The People were also ordered to provide copies of several computer tapes created from data collected by the Bureau of Criminal Statistics and produced by that agency.

When the discovery request was made, Jackson's attorneys were advised that the computer tapes could not be used in conjunction with each other because there was no way to combine one set of tapes limited to victim data with another set of tapes limited to defendant data. Defendant Jackson's attorneys were further advised that the data on these tapes was incomplete due to a 30% routine underreporting factor by police agencies which supplied the raw data. Moreover, before the tapes could be used, BCS was required to write a special users' manual

for each tape. When this was done, the tapes and the manuals were turned over to Jackson's attorneys for analysis. Now Jackson's attorneys have discovered the problems associated with combining the data on the computer tapes and have advised us that additional discovery may be required to solve this problem.

Not only has discovery in <u>Jackson</u>
been difficult to accomplish, it also has
been inordinately time-consuming.

Although the order establishing race and
gender discrimination as issues to be
addressed at the reference hearing was
filed on May 3, 1984, the discovery motion
in <u>Jackson</u> was not filed until January
1985. Because the People firmly believed
(and still do) that the discovery request
by Jackson's attorneys far exceeded the
bounds of law and reason, the motion for
discovery was intensively litigated.

As might be expected from a case of this importance and magnitude, once the initial order granting discovery was made on June 26, 1985, 6/defendants in other death penalty cases throughout this state followed suit with similar discovery requests. Thus, throughout the state, in numerous cases, at various stages of their litigation, defendants filed such discovery ery motions.

## C. Conclusions to be Drawn from the Jackson Case's Discovery Process

Several troubling conclusions stand out as a result of the discovery process in <u>Jackson</u>. (1) Most of the data is a matter of public record and could have

<sup>6.</sup> The referee's first order of discovery was filed on June 26, 1985. However, at the People's request, this order was reconsidered. Subsequent litigation resulted in the California Supreme Court's order largely affirming the referee on March 20, 1986.

been obtained much earlier by Jackson's attorneys. (2) The time thus wasted, together with the time spent litigating discovery, has contributed to the inordinate delay of the resolution of the issues pending in this case. (3) The qualified success by Jackson's attorneys of obtaining discovery in this case has spawned virtually identical albeit specious discovery motions in numerous other death penalty cases throughout this state. Thus, unnecessary litigation has been created for the system. (4) The discovery process in Jackson, which is not yet concluded, has been very expensive when one considers all of the Clerks' offices (58 of them) as well as the many persons involved in this effort. (5) The product of this discovery is highly questionable. The data from the Clerks' offices contains no information on race or

gender. The data is, thus, useless by itself. It must be collated with other data--race/gender of defendant, race of victim--before it will have even marginal utility. (6) The quality of even this limited data is suspect. Amici's experience with this case leads to the conclusion that substantial error may be present in the Clerks' data. This, together with the acknowledged 30% underreporting error in BCS data, suggests that any statistical analysis of even this very limited data will be useless because conclusions obtained from such data will be invalid as a matter of law. (7) Finally, even if the data obtained through this discovery process included race and gender information, and even if the data was accurate and, thus, of high quality, petitioner Jackson in California, like petitioner Hitchcock in Florida, could not prove that which they seek to prove--that race and gender are factors influencing juries and judges in making decisions in capital cases.

If the process of discovery promised something of value it might be justifiable, but as demonstrated in McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) petition for writ of cert. granted July 7, 1986 (54 U.S.L.W. 3866), statistical methods are inadequate for grappling with the factual and legal issues presented. While the hearing in McCleskey was itself grimly extensive, the one still hovering in Jackson is institutionally frightening. No such burdens should be born by our judicial system on the strength of such generalized claims as are presented here. Smith v. Balcom, 660 F.2d 573 (5th Cir. 1981) as modified 671 F.2d 858, 860 (5th Cir. 1982); Shaw v. Martin, 733 F.2d 304,

311-313 (4th Cir. 1984); Spinkellink v.

Wainwright, 578 F.2d 582, 612-614 (5th

Cir. 1978); McCorquodale v. Balcom, 705

F.2d 1553, 1556 (11th Cir. 1983); Stephens

v. Kemp, 464 U.S. 1027, 1030, fn. 2 (1983)

(Powell J., dissenting).

II

PETITIONER DID NOT ASSERT A
VIOLATION OF HIS EIGHTH AND
FOURTEENTH AMENDMENT RIGHTS
TO BE FREE FROM CRUEL AND
UNUSUAL PUNISHMENT WITH HIS
CLAIM THAT SOME GENERALIZED
ARBITRARINESS HAS RESULTED
FROM THE APPLICATION OF
FLORIDA'S CAPITAL SENTENCING
SYSTEM

In his petition for writ of habeas corpus, petitioner claimed that Florida's death sentencing system violates the Eighth and Fourteenth Amendments because it results in the death penalty being applied in Florida in an arbitrary, capricious and irrational manner. Petitioner's attack is on the system itself and on the system as a whole. He makes no assertion

the alleged arbitrariness is intentional or that he personally was subjected to invidious discrimination in his sentencing, or that, under the facts in his case, that his death sentence is in any other respect cruel and unusual punishment. Amici curiae urge that, in a state with a facially valid capital sentencing system, such non-individualized disparate impact claims as petitioner's should be foreclosed as not asserting a violation of petitioner's constitutional rights. See Procunier v. Atchley, 400 U.S. 446, 451 (1971); Townsend v. Sain, 372 U.S. 293, 312 (1963); also Spinkellink v. Wainwright, supra, 578 F.2d at 613-614.

A. States Are Entitled to a Death Penalty If Their Capital Sentencing Systems Are Properly Balanced

It is now beyond question that states are constitutionally permitted to select the punishment of death for the crime of

murder. Gregg v. Georgia, 428 U.S. 153

(1976); Proffitt v. Florida, 428 U.S. 242

(1976); Jurek v. Texas, 428 U.S. 262

(1976).

However, in recognition of the unique nature of the punishment, a state's capital-sentencing system must accommodate both a sensitivity to the uniqueness of each defendant and case and a concern for consistent application of the sentence.

These "twin objectives" exist in a state of balanced tension and the Court's decisions make it clear that maintaining the balance is the key to the constitutional validity of the death penalty. Eddings v. Oklahoma, 455 U.S. 104, 110-111 (1982).

To provide "measured, consistent application," a state's capital-sentencing system must itself "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action"

(the particular concern expressed by the Court in Furman v. Georgia, 403 U.S. 238 (1972)) by means of a "carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance." Eddings v. Oklahoma, supra, at 111; Gregg v. Georgia, supra at 189, 195. The system must thus be able to "rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not." Spaziano v. Florida, 468 U.S. 447, 460 (1984).

In addition, to provide what the

Court has called "fairness to the

accused," the sentencing authority must

take into account "any aspect of a defen
dant's character or record and any of the

circumstances of the offense that the

defendant proffers as a basis for a

sentence less than death." Lockett v.

Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, supra, at 111, 113-114. This requirement necessarily dictates that the sentencing authority be given discretion to decide the penalty of death, on the basis of all the facts presented to it.

Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

Thus, the Constitution requires that the sentencing authority's discretion be limited enough to provide some consistency, but yet be kept abroad enough to properly bring the subjective conscience of the community to bear on the unique circumstances of each case. Once a state has provided for these delicately balanced concerns, the state is permitted under the Constitution to select death as a penalty for the crime of murder.

# B. The Issue of the Constitutionality of Florida's Capital Sentencing System Has Been Settled

No less than three times the Court has concluded that Florida's capitalsentencing system has successfully "struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the penalty is not imposed arbitrarily or discriminatorily." Spaziano v. Florida, supra, 468 U.S. at 464-465; Barclay v. Florida, 463 U.S. 939, 952-958, 958-967 (1983); Proffitt v. Florida, supra, 428 U.S. 222, 252-253, 260-261. Nevertheless, the petitioner claims Florida's capital-sentencing system itself is unconstitutional because, as applied, it results in some arbitrariness.

We are a nation of laws implemented by humans incapable (and undesirous) of machine-like consistency. A capitalsentencing system cannot be statistically programmed to spew out the appropriate sentence for each defendant convicted for a capital crime. To do so would be to eliminate the judge and jury from the process. Clearly, we have no choice but to rely on humans. If the thousands of judges and jurors who sit on this country's capital cases are, as a class, biased, then the tens of thousands of judges and jurors who sit on other criminal cases are biased. No guilt or penalty decision in any criminal case would be free of that bias. No properly constituted jury could ever be impaneled. As noted by Justice White in his concurring opinion in Gregg v. Georgia, supra, at 226:

"Petitioner has argued, in effect, that no matter how effective the death penalty may be as punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be

accepted as a proposition of constitutional law."

When crimes are committed, society must protect itself by punishing the wrongdoers. Certainly petitioner's claim could not have been taken seriously if he had asserted that Florida's entire criminal sentencing system, non-capital as well as capital, was unconstitutional because of some arbitrariness in its application and therefore that all resulting sentences and sanctions should be stricken. His claim is not made more tenable by limiting his assault only to death sentences. To be sure, the penalty of death is fundamentally different from the penalty of imprisonment, but a state satisfies the constitutional imperative of that difference by establishing a capitalsentencing system which meets the standards of Gregg and Lockett and their progeny. Once those standards are met, as

they are here, petitioner's claim has no greater power than it would in a simple burglary case.

In Furman v. Georgia, supra, 408 U.S. 238, the Court addressed with great difficulty a generalized claim of arbitrariness in the imposition of the death penalty. Since then the court has labored hard "to provide standards for a constitutional death penalty" which would remedy the arbitrariness condemned in Furman and obviate the need to address generalized claims of such arbitrariness. See Eddings v. Oklahoma, supra, at 111. For the Court to once again entertain these generalized attacks would be to cast aside not only the Court's labor of the last ten years but also that of the States which have endeavored to meet the Court's standards. Having met these standards, Florida should not be put to the task of having to

repeatedly defend its capital sentencing system against generalized claims of disparate impact.

we urge that a state capital sentencing system which meets the guidelines of the Court's post-Furman cases is presumptively free of the generalized arbitrariness condemned in Furman. See Spinkellink v. Wainwright, supra, 578 F.2d 582, 599-606, 613-614. As noted by Justice Powell, who was joined by Chief Justice Burger and Justices Rehnquist and O'Connor, in a dissent from the grant of a stay in Stephens v. Kemp, 464 U.S. 1027, 1030-1031 fn. 2 (1983):

"Surely, no contention can be made that the entire Georgia judicial system, at all levels, operates to discriminate in all cases. Arguments to this effect may have been directed to the type of statutes addressed in Furman v. Georgia, 403 U.S. 238 (1972). As our subsequent cases make clear, such arguments cannot be taken seriously under statutes approved in Gregg v. Georgia, 428 U.S. 153 (1976)."

## C. Florida Cannot Fashion A "More" Constitutional System Than The One It Has

To strike Florida's capitalsentencing system as unconstitutional on a generalized claim of arbitrariness would in effect deprive the State of Florida from ever having a capital-sentencing system. Any subsequent legislative efforts to further "minimize the risk of wholly arbitrary and capricious action" beyond the present constitutional system's attempts would invariably run afoul of the other objective required in a capitalsentencing system, i.e., a sensitivity to the uniqueness of the individual. The delicate balance required by the Court would inevitably be disrupted. See Eddings v. Oklahoma, supra, 455 U.S. at 110-111. The only cure for the arbitrariness petitioner alleges would be to reduce the amount of discretion available to the

sentencing authority. This, however, would result in nearly mandatory death sentences which are as constitutionally prohibited as are wholly unguided ones.

Id. at 111-112; Baldwin v. Alabama,

U.S. \_\_\_\_, \_\_\_; 86 L.Ed. 2d 300, 307-303

(1985); Woodson v. North Carolina, supra,

428 U.S. 280, 301-305 (1976); Roberts v.

Louisiana, supra, 428 U.S. 325, 331-336

(1976). Since Florida cannot fashion a

"more" constitutional system than the one it has, the choice is either the current system or none at all.

Although the risk of arbitrary and capricious action can be minimized by a capital-sentencing scheme, the risk cannot be fully eliminated in a system which also must provide discretion for the sentencing authority to consider the circumstances of the offense and the defendant's character or record before imposing a death

"Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman. As we have acknowledged in the past, 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death." [Citations omitted.]" Pulley v. Harris, supra, 465 U.S. at 54.

D. Both A Claim of Arbitrary Action in Petitioner's Own Case and A Claim That the Alleged Arbitrary Action Has An Invidious Discriminatory Purpose Should Be Required

None of the above discussion is meant to suggest that arbitrary action in the imposition of the death penalty is condoned. It is not. However, for the reasons indicated above, claims of arbitrary action under a system which is constitutional as drafted and interpreted should be required to focus on the individual cases in which the arbitrariness is alleged to have occurred and should be directed to individual sentences, not to the system as a whole. 7/

See Caldwell v. Mississippi, 472 U.S. \_\_\_,
\_\_; 86 L.Ed.2d 231 (1985). Petitioner

should have to show why his death sentence
is cruel and unusual punishment for the

crime he committed. See <u>Hitchcock</u> v.

State, 413 So.2d 741 (Fla. 1982).

Additionally, where the alleged arbitrariness suggests unlawful discrimination on the part of the state, the claims must include an assertion of invidious discriminatory purpose.

Allegations of invidious discriminatory purpose have long been required in
claims of unlawful discrimination under
the Equal Protection Clause of the
Fourteenth Amendment. Batson v. Kentucky,

<sup>7.</sup> Of course, if the claims of arbitrariness are founded in an assertion that
the capital-sentencing system is invalid
because of the way it has been drafted or
interpreted, those claims will always be
entertained. See Godfrey v. Georgia, 446
U.S. 420 (1980).

Also, in some instances evidence as to how the system is operating as a whole may

be relevant to the ultimate determination of whether there was unlawful action in the individual case. The focus of the claim, however, would remain on the individual case. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 264-266 (1977); Alexander v. Louisiana, 405 U.S. 625, 630-632 (1971).

(1986); Memphis v. Greene, 451 U.S. 100,
119 (1981); Arlington Heights v.

Metropolitan Housing, supra, 429 U.S. at
265. Similarly, where a due process claim under the Fifth Amendment has been deemed to contain an equal protection component, there is a requirement of an "invidious discriminatory purpose" allegation. Wayte v. United States, 470 U.S. \_\_\_, \_\_; 84

L.Ed. 2d 547, 556 fn. 9 (1985).

It follows, therefore, that to the extent cruel and unusual punishment claims under the Eighth Amendment contain an equal protection concern that the death penalty not be imposed discriminatorily, they also must include an assertion of invidious discriminatory purpose to be cognizable. The basic thrust of the claims are the same: governmental action

has resulted in invidiously discriminatory impact.

### E. Conclusion

On its face, petitioner's sentence of death is neither arbitrary nor capricious. Neither is the system under which petitioner was sentenced to death. Since petitioner made no claim that in his own case the death penalty was purposely applied in an invidiously discriminatory manner on him, he did not fashion a claim which asserted a violation of his constitutional rights, and the District Court properly denied petitioner's request for an evidentiary hearing. See Procunier v. Atchley, supra, 400 U.S. at 451; Townsend v. Sain, supra, 372 U.S. at 312.

EVEN IF PETITIONER ASSERTED A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, HE DID NOT ALLEGE FACTS WHICH IF PROVED WOULD SUPPORT HIS CLAIM

Petitioner's claim is directed at
Florida's entire capital-sentencing system
itself. If a hearing on that claim was
not foreclosed for the reasons previously
set forth, petitioner was still required
to allege facts in support of his claim
which, if proved, would have entitled him
to the relief sought. See <a href="Procunier">Procunier</a> v.
Atchley, <a href="supra">supra</a>; <a href="Townsend">Townsend</a> v. <a href="Sain">Sain</a>, <a href="supra">supra</a>.
Petitioner's showing in this regard was
inadequate as a matter of law.

The sole proffered factual support for petitioner's claim consisted of general statistics. Asserted in his petition for writ of habeas corpus were statistics, among others, that "...

Orange County sentences to death 54.2% of

the persons convicted of first degree murder in which a felony is involved, compared to 32.0% in other metropolitan areas. . . [O]nly 1.6% of women indicted for first degree murder received the death penalty . . . compared to 12.4% of men indicated for first degree murder. . . . Among persons indicted for first degree murder, 11% received the death penalty if their victims were in skilled jobs, and 27% received the death penalty if their victims were in professional jobs. . . . Of those persons . . . charged with the murder of a white victim, 16.5% received the death penalty, compared to only 2.8% of those charged with the murder of a black victim. . . . "

In addition to his initial proffer,
petitioner filed a tentative draft of a
study by Professors Gross and Mauro "as a
supplemental appendix 'to show a prima

facie basis for [his] claim . . . and for discovery concerning the issue.' Rlll. The study has since been published as Gross & Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 Stan.L.Rev. 27 (Nov. 1984). See Petitioner's Brief on the Merits, p. 52 fn. 58. The statistically-based conclusion of Professors Gross and Mauro presented to the District Court was that "[i]n Florida the overall odds of an offender receiving the death penalty for killing a white victim were 4.8 times greater than for killing a black victim." Gross & Mauro, supra, at 78-79.

It is evident that all petitioner offered in support of his request for an evidentiary hearing were superficial disparities in the rates the death penalty is imposed. He assumes, and would have

had the District Court assume, that those disparities reflect arbitrariness in the imposition of death sentences in Florida. This is an unfounded assumption.

There may be a "disparity," for example, between the percent of women indicted for murder who receive death sentences when compared to the percent of men indicted for murder who receive death sentences. However, this "disparity" would hardly be a reflection of arbitrariness if it were merely a reflection of the qualitatively and quantitatively different ways in which men and women kill. The disparity itself does not shed light on whether it is an arbitrary one. Likewise, the other reported inconsistencies no more support petitioner's conclusion of arbitrariness in the imposition of death sentences in Florida than other more constitutionally acceptable conclusions

that Orange County is the hapless host of more than its share of Florida's worst murders, that persons better off in a socio-economic sense are more likely than poorer persons to be targets of capital eligible type murders such as killings in the perpetration of a robbery or burglary, and that white persons are generally more likely than black persons to be the targets of these types of murders. Petitioner's reported statistical disparities have no probative value in and of themselves.

Another way to look at the inadequacies of the disparities presented by
petitioner is the irrelevancy of their
comparisons. They are as "meaningless" as
the racial-composition percentage comparisons rejected by the Court in Mayor v.

Educational Equality League, 415 U.S. 605,
620-621 (1974) for not being comparisons

of persons in similar positions. "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." Hazelwood School District v. United States, 433 U.S. 299, 308 fn. 13 (1977).

In the context of the instant case, there are particularly special qualifications required of persons who kill to make them eligible for a death sentence. Not only do they have to be arrested, charged, and found guilty beyond a reasonable doubt of first degree murder, they also must be associated with at least one statutory aggravating circumstance. See

\$5 782.04(1), 921.141(5)(6), Fla. Stats.
(1985). All of petitioner's comparisons are to a considerably more general

population of killers than this narrow category.

Petitioner compares the death sentence group to groups in which the killers were only suspected of committing a homicide, 8 or only charged with murder, or only convicted of first degree murder, or only convicted of first degree murder when some other type of felony was also involved. 9/ However, not all homicides, not all indictments for murder, not all convictions for first degree murder, and not even all convictions for first degree murder involving another felony, will result in the findings required to qualify a defendant for consideration of imposition of the death penalty. See \$\$ 782.04, 5 921.141 (5), (6), Fla. Stats.

(1985) [e.g., neither a first degree murder which is merely a premeditated killing nor a first degree murder perpetrated in the course of felonies other than the ones listed make a person eligible for the death penalty.]

Petitioner apparently assumes that capital-eligible killings are equally distributed between white victims and black victims and equally distributed in cases involving murder indictments and convictions. He assumes, for example, that women indicted for first degree murder have committed capital-eligible killings (including killings in the course of robberies, burglaries and rapes) at the same rate that men indicted for first degree murder have committed such killings. As any student of this country's criminal justice system knows, in the words of the Fifth Circuit, "No

<sup>8.</sup> Gross & Mauro, supra, at 49.

Pet. for Writ of Habeas Corpus at
 57-58, ¶¶ G(2)(a), (b), (c), (d).

conclusions of evidentiary value can be predicated upon such unsupported assumptions." Smith v. Balkcom, supra, 671 F.2d at 860 fn. 33.

In implied recognition of this flaw in his presentation, petitioner relies heavily on Gross and Mauro's efforts to determine whether non-racial factors might explain the race-of-victim disparity.

Gross and Mauro conclude that they do not. Their conclusions, however, like petitioner's are based on unwarranted assumptions. Gross and Mauro, supra, at 66.

The Gross and Mauro study itself
undermines the assumption that capitaleligible killings are equally distributed
between white and black victims.

Reworking the figures given in Gross and
Mauro's Tables 1 and 4 to determine
whether white persons are more likely than
black persons to be victims of killings

involving the commission of a separate felony, it reveals that they overwhelmingly are. 10/Of all the homicides in Florida involving either a black or a white victim (3,486), 51.7% (1,803/3,486) were white and 48.3% (1,683/3,486) were black. However of the homicides reported by petitioner to also involve the commission of a separate felony (474), 73.0% (346/474) of the victims were white but only 27.0% (128/474) of the victims were black. Although the perpetration of a killing in

<sup>10.</sup> Homicides involving the commission of a separate felony do not necessarily result in capital-eligible convictions since, among other things, killings in the commission of only a select few felonies could ever result in capital-eligible convictions. However, amici curiae will indulge in petitioner's assumption, for this example only, that petitioner's figures for the number of homicides involving the commission of a separate felony include at least some of the killings which eventually result in capital-eligible convictions.

the course of some felonies constitutes
the commission of a capital-eligible
offense, any assumption that
capital-eligible killings are equally
distributed between white victims and
black victims is likely to be as unfounded
as the assumption that killings involving
the commission of a separate felony are
equally distributed between white victims
and black victims. 11/10., at 55, 57.

Another reason that petitioner's reported disparities do not support his conclusion that Florida's capital—sentencing system is applied arbitrarily is that petitioner presented material to the District Court which conflicts with that conclusion. Specifically, petitioner presented the Gross and Mauro study which found that the race of the suspect did not significantly affect capital—sentencing decisions in Florida. Id. at 82.

The theory underlying petitioner's claim is that race discrimination "has continued to inform the decision to impose the death sentence for homicide in Florida. . . . " Pet. Brief on Merits

<sup>11.</sup> Although Gross and Mauro acknowledge that there might be variables which were omitted from their data which could explain the racial disparities on nonracial grounds, they then plead unawareness of any such variable. One critical sentencing variable which was omitted from their consideration was the type of felony involved in the homicide convictions. As repeatedly stated herein, it is the commission of only a few felonies, such as robbery, burglary, rape, etc., which can elevate a homicide to a capital-eligible murder. At the time of Gross and Mauro's study, a killing in the course of a felony drug sale did not necessarily constitute a capital-eligible murder. Neither did a killing occurring at the same time as another, but non-fatal felony aggravated assasult. Given the

differences in the rates in which blacks and whites are victims of homicides involving all types of separate felonies, it is plausible to hypothesize that there are substantial differences in the rates in which the two groups are victims of capital-eligible murder. See <a href="mailto:id="id">id</a>. at 99-102.

at 48. He asserts that the reported raceof-victim disparities in the imposition of
the death penalty in Florida reflect "the
continuing effects" of "official approval
of and tolerance for violence against
black people." Id. at 72, 73.

If the State of Florida's prosecutors, judges, and jurors are so racist that they are deciding who lives and who dies on the basis of race, it is inconceivable that this racism would operate only when the race of the victim is being considered and not operate when the race of the accused is being considered. It is even more incredible to speculate that this purported victim-based racism would still operate when the accused and the victim are both of the same race, as in petitioner's case.

Thus, petitioner's factual allegations clearly do not support his conclusion that Florida's capitalsentencing system is arbitrarily applied.
He was not entitled to a hearing on that
conclusion.

#### CONCLUSION

The instant case presents the question whether the District Court erred in determining that petitioner did not proffer sufficient evidence to entitle him to a hearing on the discrimination issues. We submit the District Court was correct: petitioner's factual and legal arguments in support of his claim are without merit. The granting of a hearing on the basis of this evidence will lead ineluctably into a vast swamp of statistical data which can not be used to prove his contentions.

Petitioner's challenge is at heart a charge that the judicial system does not work. As Justice White stated in Gregg,
"This cannot be accepted as a proposition

of constitutional law." Gregg v. Georgia, supra, 428 U.S. at 226 (White, J., concurring).

For the reasons set forth above, the order of the District Court should be affirmed.

Respectfully submitted,

John K. Van de Kamp, Atorney General of the State of California

Ira Reiner, District Attorney of Los Angeles County

Michael D. Wellington George M. Palmer Supervising Deputy Attorney General

Deputy District Attorney

Susan Lee Frierson Deputy Attorney General

Harry B. Sondheim [Counsel of Record] Head Deputy District Attorney Appellate Division